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Abstract

Several international policy documents define the environment as made of "natural heritage" and "cultural heritage" together, along the lines of concepts such as "biosphere" or "ecosystem" which have been introduced relatively recently to define the complexity of human-environment interactions. Nevertheless, distinguishing natural heritage from the cultural one helps analyse situations where damage inflicted to the

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The laws and doctrines in this Article are accurate and updated as of November 18, 2020. Comments are most welcomed; they can be addressed to r.vecelliosegate@connect.um.edu.mo.

former negatively impacts the latter. In fact, cultural heritage sits under siege worldwide due to polluting activities and environmental degradation, which are causing irreparable damage to—or even the disappearance of—valuable expressions of civilisations' legacy. Most damages are transboundary, thereby calling into question bilateral forms of States' liability; others involve a globalised dimension of climate change, addressed through "trusteeships" whereby the international community establishes centralised compliance schemes which are built on incentives and sanctions while do not necessarily provide for clear-cut liabilities. Yet, this uncertainty on the liability schemes to be applied to different sources of environmental damage to cultural heritage in peacetime remains underexplored in legal scholarship, which rather tends to focus on the protection of cultural heritage in armed conflicts, on environmental damages exclusively considering the environment's natural elements, on state liability within domestic jurisdictions only, or on liability as a corollary of state responsibility. Two categories of events are to be assessed: those where a home damage to the environment results in damage to cultural heritage abroad, and those where the damage to both occurs directly extraterritorially; these both may occur due to state initiatives, or through malpractices of corporations which are neither owned nor controlled by the State. Strict, absolute, or "soft" liabilities are invoked by private parties when their property is violated, or by States when their heritage as a collective good is damaged, but might also involve the international community as a whole when such cultural expressions are deemed of public interest and conceptualised as "global commons." When it comes to damages of this sort, it is unlikely that States purposively caused them or even deliberately refrained from preventing them; what is more, these damages often occur as a result of concurrent actions by multiple countries over extensive periods of time. Consequently, the legal analysis on liabilities warrants to be framed under a broader cosmopolitan solidarity and burden-sharing perspective, whereby States voluntarily uphold the convenience of selected forms of international liability, in order to protect cultural heritage and contain one of the most perilous side-effects of deregulated anthropisation. To this end, China's metamorphosis from law-recipient to law-maker status on the international plane is worth focusing on. By scrutinising Beijing's approach to (international) environmental law during the "Western humiliation" period, the WW2 aftermath, the "Cultural Revolution", and the transition to world power status under the label of "socialist market economy with Chinese characteristics," it is possible to draw inferences on what liability schemes for cultural heritage protection are deemed desirable in Chinese politics and discourses. An investigation of the values underpinning China's policies over the last decades facilitates the tracing of the normative spillovers from environmental law to cultural heritage law (and vice versa), as well as the

debunking of implementation asymmetries between domestic and international preferences.

I. Introduction

Compared to the environmental catastrophes brought about by climate change and to the health upheavals owing to pollution, environmentally dependent damages to cultural heritage may seem *prima facie* relatively negligible. And yet, cultural heritage not only matters for cementing feelings of belonging, but it truly represents the sense of continuity across generations in both peacetime and wartime;[1] it embodies the ultimate meaning of *sustainable* development,[2] in that it contributes to the very existence of identity-aware societies that stand able to value their past in order to secure their future.[3] Cultural heritage is a living idea blending nature and humans, as much as a contribution to sustainable peace efforts;[4] despite its "touristicisation" the World Heritage List ("WHL") is routinely blamed for, cultural heritage seems to resist globalisation, or at least to expose the latter's inherent contradictions without being vanquished by it. Rightly or wrongly, cultural heritage has been offered even higher protection than civilians in several armed conflicts all throughout the XX century; a well-known example is that of the Second World War ("WW2"), when e.g., Paris, Milan,[5] as well as the literary treasures of the Montecassino Abbey were spared thanks to *deliberate* choices by Allied and Nazi-Fascist military commanders alike. Nowadays, monuments *et similia* are not threatened by regular armed conflicts, but by irregular forces (paramilitaries, rebels, terrorist, mercenaries, …) and "new" asymmetrical

1. Roger Michael O'Keefe, *Cultural Heritage and International Criminal Law*, SÉBASTIEN JODOIN & MARIE-CLAIRE CORDONIER SEGGER, SUSTAINABLE DEVELOPMENT, INTERNATIONAL CRIMINAL JUSTICE, AND TREATY IMPLEMENTATION, 120–150 (2013).

2. Lisa Rogers, *Intangible Cultural Heritage and International Environmental Law: The Cultural Dimensions of Environmental Protection,* 29(3) HIST. ENV'T 30, 34–35 (2017)

3. *See, e.g.*, Hangzhou International Congress China - Culture: Key to Sustainable Development, *The Hangzhou Declaration: Placing Culture at the Heart of Sustainable Development Policies,* CLT-2013/WS/14 (May 17, 2013).

4. *See generally* Iwona Szmelter, *New Values of Cultural Heritage and the Need for a New Paradigm Regarding its Care,* Conservation: Cultures and Connections (2013), https://perma.cc/7X58-Q62E.

5. "Sir Charles Portal, Royal Air Force's Commander-in-Chief, severely admonished the colonel of the fighter bombers after their incursion over Milan on 24 October 1942, during which the Cathedral risked to be razed to the ground, as he had heavily and unnecessarily put into question the loyalty of any military officer who cares about artistic treasures, as well as RAF's reputation before the civilized world of today and those next-to-come," Fernanda Mottura, La circolazione delle opere d'arte nel diritto dell'Unione Europea e i limiti posti dall'ordinamento italiano 30 (2016) (unpublished dissertation, LUISS) (translated by author).

warfare techniques; in an even more widespread fashion, they are at risk because of climate change, pollution[6] and environmental degradation,[7] which are exactly the factors this paper is premised to investigate in greater detail. Here, the environment is not simply made reference to as a good to be protected in times of conflict[8] or its aftermath, but as a legal, policy and conceptual framework of use when it comes to protecting cultural heritage in both peacetime and wartime, in a way that allows environmental protection to fill the gaps in cultural heritage protection, and vice versa. Human life is inherited together with a "code" that generations secretly pass onto the upcoming ones, made of interdependence and contextuality between culture and nature.[9] Cultural legacies and symbols *in their environmental contexts* are what remains (or *should* remain) when time goes by,[10] that is, what allows different generations of the same nation[11] to recognise each other as part of the same unwritten contract built on shared meta-narratives bearing legal significance.[12] The same paradigm applies to the global society when it comes to heritage of universal value, which is why "domestic relaxed rules protecting the cultural or natural heritage

6. *See generally* JOHN WATT ET AL., THE EFFECTS OF AIR POLLUTION ON CULTURAL HERITAGE (2009). For an exemplification in China, see Lynn G. Salmon, *Airborne Pollutants in the Buddhist Cave Temples at the Yungang Grottoes, China*, 28 ENVTL SCI. TECH. 805 (1994); Christos S. Christoforou et al., *Passive Filtration of Airborne Particles from Buildings Ventilated by Natural Convection: Design Procedures and a Case Study at the Buddhist Cave Temples at Yungang, China*, 30 AEROSOL SCIENCE & TECHNOLOGY 530 (1999).

7. One example is the water-infrastructure projects executed in view of the Běijīng 2008 Summer Olympics, which gravely impacted the environment and, consequently, the cultural heritage resting therein. *See* Chen Shen & Hong Chen, *Cultural Heritage Management in China: Current Practices and Problems*, CULTURAL HERITAGE MANAGEMENT: A GLOBAL PERSPECTIVE 70, 77 (Phyllis Mauch Messenger & George S. Smith eds., 2010).

8. *See, e.g.*, Protocol Additions to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3; *see also* S.C. Res. 687, ¶ 16 (Apr. 3, 1991); G. A. Res. 47/37, (Nov. 25, 1992 ("Stressing" preambular clause).

9. Rodney Harrison, *Beyond "Natural" and "Cultural" Heritage: Toward an Ontological Politics of Heritage in the Age of Anthropocene*, 8 HERITAGE AND SOCIETY 24, 30 (2015).

10. Relatedly, "one should not forget the political aspect of the decision as to what is to be preserved for future generations. A central idea which accompanies the view of cultural heritage as a form of inheritance is its characterisation as a non-renewable resource akin to the environment." Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 69 (2000).

11. "Nation" is employed here in its proper ethnical sense, and not in its geopolitical connotation of "country" as it is at times confused for even in official documents (*see, e.g.*, *infra* note 25).

12. Peter Häberle, *A Constitutional Law for Future Generations – the "Other" Form of the Social Contract: The Generation Contract*, HANDBOOK OF INTERGENERATIONAL JUSTICE 215, 221–225 (Joerg Chet Tremmel ed., 2006).

situated in the territory of a single [S]tate, as well as the poor administrative enforcement of those rules, affects the interests of people residing all over the world, all of whom share in the common heritage of mankind."[13]

International responsibility and international liability are not synonymous, in that a State may be held liable for certain conducts which do not reach the threshold or fall within the scope of internationally wrongful acts.[14] In extremely simplified and unavoidably vague terms, one may affirm that international liability is about compensating (bilaterally, through multilateral funds, by means of "participated" regional organisations' budget, and so forth) a state or non-state foreign party for the harmful effects of a state or state-backed or "state-negligent" action without admitting to the unlawfulness of such an action (i.e., without accepting nominal, declarative responsibility for it, including consequences like international retaliation and international sovereign lawsuit), thus without the need for the injured party to prove neither the causal link between the action and the *seemingly resulting* harm, nor between the action and those state actors *seemingly perpetrating* it beyond a *prima facie* administrative assessment of the harm. It is of the essence to emphasise that responsibility-independent liability has nothing to do with charges of morality: it is not a moral form of responsibility which replaces the legal one,[15] but a different legal device which comes into play whenever it is unfeasible, inconvenient, unlawful, or evidence-wise untenable to invoke responsibility. It is a different shade or manifestation of legal responsibility that shifts the focus of policy priority from fault-attribution to money-dispensation, and it might even be considered concomitantly with judicial intervention. Moreover, it is especially helpful when collective actions are involved. It was argued elsewhere that natural catastrophes are not only the product of deregulation in its meaning of "rules missing", rather, they are deeply embedded in regulatory schemes *as they are already designed*

13. Stefano Battini, *The Procedural Side of Legal Globalization: The Case of the World Heritage Convention*, 9 INT'L J. CONST. L. 340, 346 (2011).

14. On the distinct application of these two doctrines, see Alexandre Kiss & Dinah L. Shelton, *Strict Liability in International Environmental Law*, TAFSIR NDIAYE & RÜDIGER WOLFUM, LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES: LIBER AMICORUM JUDGE THOMAS A. MENSAH, 1131–1152 (2007); Owen McIntyre, *Responsibility and Liability in International Law for Damage to Transboundary Fresh Water Resources*, RESEARCH HANDBOOK ON FRESHWATER LAW AND INTERNATIONAL RELATIONS, 335–365 (Mara Tignino & Christian Bréhaut eds., 2018); Tullio Scovazzi, *State Responsibility for Environmental Harm*, 12 YEARBOOK OF INT'L ENVTL. L. 43, 43 n. 2 (2001).

15. On faultless responsibility as a device for indirect attribution of moral forms of responsibility, see Luciano Floridi, *Faultless Responsibility: On the Nature and Allocation of Moral Responsibility for Distributed Moral Actions*, 374 PHIL. TRANSACTIONS ROYAL SOC'Y A (2016), https://perma.cc/E4Q8-3FAK.

and operated;[16] in this sense, some might interpret this faultless-liability concept as a form of institutionalised production of threats which are only redressed monetarily whilst nobody is held accountable and publicly shamed. This piece will argue that faultless liability can be deemed to be *the best possible compromise to protect cultural heritage in certain circumstances and political contexts*, and it works in a more sophisticated manner compared to complete absence of shame. It calls for a rethinking of policy and legal priorities, to save what can be saved and to insure against risks whose uninsured concretisations would bear disastrous social repercussions for local populations or even the global village. Eventually, it caters for the regrettable truth that in the global governance of the environment, "acknowledgment of responsibility is only weakly linked in practice to accountability mechanisms unless they are formally established within specific legal instruments"[17] (such as liability ones, indeed).

Coherently with the rough definition of international liability just provided, this contribution will *not* examine the direct applicability of the international human rights law[18] or international criminal law[19] regimes to cultural heritage protection, nor will it scrutinise the attribution of state responsibility for internationally wrongful acts, per se.[20] It will presuppose that harms can be ascribed to a defined population in a roughly identifiable territory, thus we will not refer to climate-change-induced migrations and consequent abandonment of tangible heritage or re-adaptation of intangible one, either.[21] On the model of a variety of formal and informal, regional and international instruments,[22] it will rather analyse: state liability as a component of the breach of States' international obligations; state liability

16. *See*, *e.g.*, Julia Dehm, *International Law, Temporalities and Narratives of the Climate Crisis*, 4 LONDON R. INT'L L. 167, 188 (2016).

17. Steven Bernstein, *The Absence of Great Power Responsibility in Global Environmental Politics*, 26(1) EUR. J. INT'L REL. 8, 21 (2020).

18. *See, e.g.*, Leonard M. Hammer, *Cultural Heritage Protection and Sacred Spaces: Considering Alternative Approaches from Within the Human Rights Framework,* 49 COLUM. HUM. RTS. L. REV. 73, 73–113 (2018).

19. *See generally* Francesca Sironi De Gregorio, *Attacking Cultural Property to Destroy a Community: Heritage Destruction as a Crime Against Humanity and Genocide*, 1 IUS IN ITINERE 3*,* 3–34 (2020) (a well-updated summary on said applicability).

20. For an illuminating challenge to the supposition that States owe injured parties full compensation for internationally wrongful acts regardless of the former's socio-economic conjuncture, *refer to* Martins Paparinskis, *A Case Against Crippling Compensation in International Law of State Responsibility*, 83(6) MOD. L. REV. 1246, 1246–1286 (2020), https://perma.cc/E9EK-UW7U.

21. *See* Hee-Eun Kim, *Changing Climate, Changing Culture: Adding the Climate Change Dimension to the Protection of Intangible Cultural Heritage*, 18 INT'L J. OF CULTURAL PROP. 259, 261–65 (2011).

22. *See* HANNES DESCAMPS ET AL., INTERNATIONAL DOCUMENTS ON ENVIRONMENTAL LIABILITY (2018) (systematising most relevant conventional laws on international liability concerning environmental damage).

for injurious but non-wrongful acts, emphasising the harm rather than the conduct provoking it; state liability triggered by "soft" non-compliance procedures incapsulated in contemporary environmental agreements, mostly due to the fault of wilful negligence (culpable carelessness), based on codified or customary due diligence expectations; and particularly focusing on China, statutory liability of private parties before domestic courts of the injuring or injured State(s), especially in cases of damage to cultural heritage which can be reformulated as environmental damages, adding to the property damage per se. These forms of liability invest private parties when their property is violated,[23] or States when their heritage as public/collective good is damaged, but it might also involve the international community as a whole when such an heritage is deemed of public interest at large and conceptualised as "global commons" (comparably to e.g., the seabed in the UN Convention for the Law of the Sea). Some damages may engage shared forms of liability; conversely, when numerous members of the international community are affected, it would perhaps be worth considering the introduction of an *actio popularis* doctrine in public international law, jointly with multilateral funds dedicated to these occurrences. At any rate, as we will examine in greater detail *infra*, certain legal solutions agreed upon internationally by States are borderline between several typologies of liability; let us formulate an example. Let us suppose we have thirty countries establishing a multilateral fund for compensating each other in the aftermath of potential transnational harm to their cultural heritage due to polluting activities from their businesses, where each State contributes to the fund a percentage of its GDP but regardless of what happens, cannot benefit from the fund for more than one tenth of that fund's total endowment, because the main redress should come from businesses themselves and the fund enters into play in the gravest emergencies only. Let us further suppose that one subscriber to this fund pollutes other five members because of a very dramatic incident occurred to one of its main factories situated along a strategic border, and the laws of that polluting subscriber stipulate that the business polluter shall pay up to a certain sum expressed in absolute terms, and the rest might be covered by international funding. Thus, the private polluter will contribute its part to clean up the environment and try to restore the heritage of the five foreign States, and the State the polluter belongs to will draw from the multilateral fund the remaining sum, till reaching the cap previously mentioned, in accordance with the multilateral arrangement's rules. Under international law, is this a case of civil liability of the polluter *through the arrangement agreed upon by "its" State*, or of

23. *See* Peter Tzeng*, The State's Right to Property Under International Law*, 125 YALE L.J. 1805, 1805–19 (2016) (another standpoint on the matter is that of a highly debatable "right to property" under international law, which will not be discussed here).

state liability of the polluting State? Arguably both. This was a relatively straightforward example, yet needless to stress, matters in real life are often much more complicated. For example, some harms are hardly quantifiable monetarily, and companies are subjected to different domestic regimes depending on whether they are a parent company, a subsidiary, and so forth.

The two overarching purposes of this study are to demonstrate that the legal device of *responsibility-independent international liability* is a useful concept to frame cultural heritage protection (particularly that of the "commons") in environmental legal terms, and to theorise the extent to which such a framing strategy would be accepted within the Chinese understanding of global governance and the international legal order. The rationale underpinning this case-study on China is that whilst much of the pollution it produces remains within its borders, a non-negligible portion is "exported," especially to neighbouring territories such as the Korean peninsula, Japan, Taiwan, or Siberia; to exemplify,

> [a] chemical analysis of acid rain in Japan indicates that the problem in Japan stems from emissions in China. Acid rain during the winter in Niigata Prefecture, which is on the coast of the Sea of Japan, contains a mix of sulfur and sulfer oxides consistent with emissions from the burning of Chinese coal. Acid rain in Niigata contained the same quantities of the sulfur isotopes S32 and S34 that are found in Chinese emissions. Sulfur oxides, nitrogen, and other substances that cause acid rain originate from the burning of fossil fuels such as coal and oil. Because the mixture of sulfur oxides and sulfur isotopes varies according to the type of fossil fuel consumed, it can be used to trace the origin of polluted air. The burning of coal in China produces emissions with S34 concentrations; these are more than three times as high as that found in emissions from factories in Niigata Prefecture itself. To get a comprehensive view, scientists checked for S34 in rain and snow in Nagaoka, Niigata Prefecture, during 1991. The results showed that quantities of the acid rain–related substance rapidly increased during the months of January, February, November, and December of 1991, when seasonal winds from the Chinese mainland blew across the Sea of Japan. China's massive consumption of coal, which is causing the acid rain problems in Northeast Asia, is certain to become a global problem in the near future. China refuses to allow any joint monitoring of its acid rain problem, insisting that it is a domestic issue.[24]

24. PRADYUMNA P. KARAN, THE NON-WESTERN WORLD: ENVIRONMENT, DEVELOPMENT, AND HUMAN RIGHTS 108 (2006).

This calls into debate both transboundary forms of pollution and polluting activities contributing to global climate change. An in-depth understanding of China's preferences in terms of liability is *a fortiori* essential due to its growth economically but also geopolitically within the international order. As Beijing tries to uphold its image as a "responsible nation"[25] or "responsible power" [*fù zérèn dàguó*, 負責任大国], it will be crucial to monitor the differences (if any) between China and the United States ("US") regarding the international environmental dossier, in its intersection with the preservation of artistic expressions of outstanding value. Indeed, the latter are threatened every day by polluting agents released in the atmosphere, the soil, and the waters at unprecedented speed and volumes.[26] An analysis of US laws that might help protect cultural heritage from environmental hazards has already been concluded by another Author: unsurprisingly, it mostly points to domestic legislation whilst dedicating a few paragraphs to the American stances about concerted international efforts to tackle the issue.[27] In this sense, China is certainly forward-looking, and deserving of an analysis on his own.

II. Environment and Culture

> One's sense of self, both personal and cultural, is deeply embedded in a particular parcel of land [. . .].[28]

II.1 Does the environment legally "include" culture? Or is it the reverse?

> Legacies of both nature and culture belong not simply to their places and peoples of origin but to all the earth and its inhabitants. The ethos of global ecological health, of a global genetic commons and of the global cultural heritage is of like concern. The iconic sculptures of classical antiquity are no less at home in London and Paris than in Athens, the Shakespearean legacy is as much American or German as English, and Stonehenge is the whole world's property—the British *merely its custodians*. Relics

25. Second National Communication on Climate Change of The People's Republic of China 9 (2012).

26. *See generally* CESÁREO SAIZ-JIMÉNEZ, AIR POLLUTION AND CULTURAL HERITAGE (Balkema, 2005).

27. Casey J. Snyder, *Law, Cultural Heritage, and Climate Change in the United States,* 36 PACE ENVTL. L REV. 95, 95–140 (2018).

28. Marshall Islands v. United States, 39(5) ILM 1219 (2002).

> of nature and antiquity alike warrant protection as non-renewable and in limited supply. Once gone, they are gone for ever.[29]

Protecting the environment and preserving cultural heritage are not exactly equivalent: first, damages to certain forms of heritage may prove even more irreversible than those to the environment;[30] second, the environment exists regardless of humans and subjective human interpretation, as well as functionally to other species too; third, heritage erosion may happen acutely else than gradually; fourth, while *most* environmental damages can be economically quantified, "pricing" the destruction of a universally recognised monument is nearly impossible,[31] and anyway nonsensical. This notwithstanding, the long-standing and simplistic juxtaposition of nature and culture rests on a false dichotomy the law needs to disrupt in order to protect both. Nature and culture are distinct yet interdependent, thus the law needs to keep a distinction between them whilst never losing sight of their mutual dependency in complex human environments. Destruction of—or serious damage to—cultural heritage due to pollution and other hazardous environment-impacting activities cannot be regarded as isolated incidents anymore, because of how numerous, how widespread they are, and the recurring patterns observable in their unfolding. In fact, this is not the first work suggesting to enhance cultural heritage protection by recourse to environmental law concepts and practices: among others, one American scholar pursued the same path already, making the case for cultural justice to borrow from environmental justice in order to uphold the rights of indigenous communities.[32] The present essay explores a different angle, though: that of prevention and redress of polluting effects on monuments by means of "fault-independent" liability schemes developed in the field of international environmental law ("IEL"), learning from domestic experiences. We shall start with an exercise in definition.

Defining the term "environment" can be a tedious and frustrating commitment, yet it seems *increasingly* (but not *firmly*) accepted it shall

29. David Lowenthal, *Natural and Cultural Heritage*, 11 INT'L J. OF HERITAGE STUD. 81, 85 (2005) (emphasis added).

30. *See also* Helen Phillips, *Adaptation to Climate Change at UK World Heritage Sites: Progress and Challenges*, 5(3) HIST. ENV'T: POL'Y & PRAC. 288, 289 (2014).

31. *See*, *e.g.*, CHRISTOFER LEYGRAF ET AL., ATMOSPHERIC CORROSION 3 (Wiley 2nd ed. 2016). A complete compilation of documents related to threats to monuments by polluting agents in the atmosphere is kept by UNECE's International Cooperative Programme on Effects on Materials including Historic and Cultural Monuments (ICP Materials); most of these documents are available online at https://perma.cc/U3CJ-B3VS.

32. *See* Derek Fincham, *Justice and the Cultural Heritage Movement: Using Environmental Justice to Appraise Art and Antiquities Disputes*, 20 VA. J. OF SOC. POL'Y AND L. 43–95 (2012).

include *intangible* cultural elements.[33] The Council of Europe's ("CoE")[34] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, signed in Lugano on 21 June 1993, includes only the *tangible* components of heritage within its definitory exercise,[35] and yet, from both a spiritual and economic viewpoint, cultural practices live in a symbiotic relationship with their human and natural ecosystem. For example, Cambodia's Tonle Sap Lake in the Mekong River Basin—which is the largest freshwater lake in Southeast Asia and one of the world's most productive wetland ecosystems—provides local populations with touristic attractions in the form of cultural heritage, with indigenous community heavily reliant on its floating villages to earn a living.[36] It is therefore essential for firms to play a major role in advancing sustainability schemes capable of offsetting the externalities pollution produces over the cultural heritage of communities made of individuals who are neither producers or consumers of such firms' products.[37] Equally partial are the approaches that highlight the intangible dimension *only*, although at times—for example when it comes to certain maritime environments—such a choice can be justified; the 1976 Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean ("Barcelona Convention") provides a convincing reference to this end.[38] In

33. Ben Boer, *Environmental principles and the right to a quality environment*, *PRINCIPLES OF ENVIRONMENTAL LAW* 52, 54 (Ludwig Kramer et al. eds., Edward Elgar 2017).

34. The reader is reminded of the difference between the *Council of Europe*, a non-EU institution located in Strasbourg, and the two EU institutions named *Council of the European Union* and *European Council (of Ministries)*.

35. "[. . . *P*]*roperty* which forms part of the cultural heritage; and the characteristic aspects of the landscape" [Art.2(10), emphasis added]. Indeed, even the second component is arguably made of tangible monuments, although shaped by the interaction between them and nature as defined by humans. There is a long-standing debate in literature on the possible opposability of a "public" concept of cultural *heritage* versus a "private" one of cultural *property*, yet the two are too often used interchangeably in international policy outcomes, so confusingly that the debate will not be reported or elaborated upon in the present article. *See* Derek Fincham, *The Distinctiveness of Property and Heritage*, 115 PENN STATE L. REV. 641, 641–84 (2011).

36. Malyne Neang et al., *Trade-offs Between Ecosystem Services and Opportunity Costs in Maintaining the Tonle Sap Lake Agro-ecosystem (Cambodia)*, WATER AND POWER: ENVIRONMENTAL GOVERNANCE AND STRATEGIES FOR SUSTAINABILITY IN THE LOWER MEKONG BASIN 89, 91–93 (Mart A. Stewart et al. eds., 2019).

37. Fredrick Ahen et al., *Institutional and Market Forces: The Dominant Logic of Strategic Corporate Responsibility and Innovative Value Co-Creation*, INTERNATIONAL BUSINESS, SUSTAINABILITY AND CORPORATE SOCIAL RESPONSIBILITY 97, 117 (Perez Gonzalez et al. eds., 2013).

38. "The area has a high representative value with respect to the cultural heritage, due to the existence of environmentally sound traditional activities integrated with nature which support the well-being of local populations" [Annex 1, Section B, Art.2(f)]. This is part of the 2005 amended version of the 1976 Convention, signed in Athens on 9 July 2004.

the European Union ("EU"), Directive 2001/42/EC,[39] still in force, perfectly hits the target where it lays down that environmental assessments should provide information on both tangible and intangible heritage[40] whilst particularly emphasising its eventual vulnerability.[41] Drawing also from Directives 85/337/EEC and 97/11/EC,[42] a more recent Directive (2011/92/EU)[43] reinforces these dicta and systematises the whole subject. Furthermore, Directive 2003/4/EC[44] considers "environmental information" to concern also the "conditions of human life, cultural sites and built structures inasmuch as they are *or may be* affected by the state of the elements of the environment."[45] Finally, "[t]he extent to which each option takes account of relevant social, economic and cultural concerns and other relevant factors specific to the locality"[46] is listed by Directive 2004/35/EC,[47] last amended in 2019, among the criteria to be considered when deciding what compensatory solution to adopt in the aftermath of an environmental damage within the (today-)EU. However, no official policy document addresses paradoxical situations like the one that "by the simple magic of trading more, [the EU] could make progress towards meeting its reduced GHG emissions targets with almost no [change in] people's consumption levels and habits"[48] and what this means for the sake of protecting heritage Europe-wise and extraterritorially.

39. Council Directive 2001/42, 2001 O.J. (L 197) (EC).

40. *Id.* at Annex I ¶ f (the likely significant effects on the environment, including on issues such as biodiversity, *population*, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage *including architectural and archaeological heritage, landscape and the interrelationship between the above factors*) (emphasis added).

41. *Id.* at Annex II ¶ 2 (the value and vulnerability of the area likely to be affected due to [its] special natural characteristics or cultural heritage).

42. Lazarela Kalezić, *Environmental Impact Assessment in a Trans-Boundary Context in Montenegro*, ENVIRONMENTAL SECURITY IN SOUTH-EASTERN EUROPE: INTERNATIONAL AGREEMENTS AND THEIR IMPLEMENTATION 213, 216 (Montini Massimiliano et al. eds., 2011).

43. Council Directive 2011/92, 2011 O.J. (L.92) (EC).

44. Council Directive 2003/4, 2003 O.J. (L 41) (EC).

45. *Id.* at Art.3(1)(f) (emphasis added).

46. *Id.* at Art.1.3.1 of Annex II – "Remedying of Environmental Damage".

47. Council Directive 2004/35, 2004 O.J. (L 143) (EC); *see* Kleoniki C. Pouikli, *Overview of the implementation of the directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage at European level*, 57 DESALINATION & WATER TREATMENT 11520, 11520–27 (2016) (European Directives are not immediately enforceable in the Member States: they need to be transposed into their domestic legal orders first; as for this one particularly).

48. Olivier De Schutter, *Linking trade and climate change: what room for human rights? in* CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 201, 203–4 (Mouloud Boumghar eds., 2016).

> [C]ultural objects can be seen as part of the physical public space that conditions our world view and which is part of what we normally call "the environment" or the "landscape". This role of cultural heritage as part of public space opens the way to a holistic approach […] that *brings together cultural and natural heritage* and takes into account the interactive link of such heritage with the real life of people inhabiting it. It is this holistic conception of heritage that underlies the very international efforts at developing normative instruments for the protection of landscape.[49]

In 2017, within the World Heritage Convention ("WHC") framework, the International Indigenous Peoples' Forum on World Heritage ("IIPFWH") was established during the 41st session of the World Heritage Committee ("WHComm"), but it has yet to prove its value. Even if the United Nations Educational, Scientific and Cultural Organization ("UNESCO") has carried out some successful policy work internationally, resulting in a number of soft instruments adopted over the last couple of decades,[50] there is no structural interaction between natural heritage and cultural heritage that is rendered justiciable (neither worldwide, nor regionally). The 1964 Venice Charter for the Conservation and Restoration

49. Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law,* ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 9, 11 (James Russel Grodley et al. eds., Oxford University Press 2013); *see* Andrew Butler & Ingrid Sarlöv-Herlin, *Changing landscape identity—practice, plurality, and power*, 44 LANDSCAPE RESEARCH 271, 272 (2019) (Interestingly, the Council of Europe's European Landscape Convention, signed in Florence on December 20, 2000, defines the landscape as part of cultural heritage and not vice versa (see the relevant clause in the Preamble); this might bear legal significance. On this Convention).

50. *See*, *e.g.*, UNESCO, Declaration on the Responsibilities of the Present Generations Towards Future Generation, (1997) ("Conscious…" and "Bearing in mind…" preambular clauses, together with its Art.5); Tehran Declaration on Human Rights and the Environment (May 14, 2009); *see also*, UNESCO's First Draft of a Preliminary Text of a Declaration on Ethical Principles in Relation to Climate Change (Rabat, Sep. 24, 2016) (in its art. 3, speaks of "Avoiding Harm" in terms of general access to justice and preventive measures rather than international state liability); *see also* World Network of Biosphere Reserves (UNESCO is compiling a list as the premise for its Man and the Biosphere Programme, targeting sites where extraordinarily diverse nature interacts with valuable cultural expressions of human presence and legacy); *see also* International Union for Conservation of Nature, *2010 Draft Universal Declaration of the Rights of Mother Earth*, (Apr. 22, 2018) (In 1995 the IUCN proposed a Draft Covenant on Environment and Development that explicitly enunciated the principle of intergenerational equity followed up by UNESCO two years later via the aforementioned Declaration; the 2013 UN Secretary-General's report on Intergenerational Solidarity and the Needs of Future Generations is also of interest. Nevertheless, the 2017 Declaration of Ethical Principles in Relation to Climate Change fails to take a chance for elaborating on the climate-change threat to cultural heritage).

of Monuments and Sites, and its Australian and Chinese counterparts,[51] do not elaborate on the nexus between environment and heritage, let alone by mentioning liabilities. Neither the United Nations Framework Convention on Climate Change ("UNFCCC") nor the WHC mention climate-change impacts on heritage protection, whilst the respective secretariats merely speak of information-sharing forms of collaboration.[52] The List of Sites in Danger[53] is to date the only nexus established between heritage in peril and environmental causes, as further delineated in the relevant Guidelines.[54] UNECE, for its part, commissioned precious guidelines[55] and sponsored binding covenants. For example, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context signed at Espoo, in Finland, mentions environmental impacts on monuments in its Article 1(vii); disgracefully, China is not a party to it. China is not a party to the

51. *See* Burra Charter, (1979); Principles for the Conservation of Heritage Sites in China (*Zhōngguó wénwù gǔjī bǎohù zhǔnzé*, 中国文物古迹保护准则), (2000). Both were promoted by the International Council on Monuments and Sites ("ICOMOS"), a prestigious yet private consortium of archaeologists and other heritage and art professionals. *See also Declaration on the Conservation of the Setting of Heritage Structures, Sites and Areas*, (Oct. 21, 2005) (adopted in Xi'an (China) by the 15th General Assembly of ICOMOS. Other two relevant private consortia are the International Centre for the Study of the Preservation and Restoration of Cultural Property ("ICCROM") and the World Monuments Fund).

52. Alessandro Chechi, *The Cultural Dimension of Climate Change: Some Remarks on the Interface between Cultural Heritage and Climate Change Law*, CLIMATE CHANGE AS A THREAT TO PEACE: IMPACTS ON CULTURAL HERITAGE AND CULTURAL DIVERSITY 161, 181–83 (Sabine Von Schorlemer et al., Peter Lang 2014). This, despite the fact that Art.6 UNFCCC encodes the need for international cooperation, which one should not limit to interinstitutional "cheap-talking".

53. World Heritage Convention, *Convention concerning the Protection of World Culture and Natural Heritage* Art. 11(4) (Nov. 16, 1972); Herdis Hølleland et al., *Naming, Shaming and Fire Alarms: The Compilation, Development and Use of the List of World Heritage in Danger*, 8(1) TRANSNAT'L ENVTL L. 1, 16 (2019).

54. World Heritage Convention, *Operational Guidelines for the Implementation of the World Heritage Convention*, (Oct. 26. 2016), ¶¶ 177–191. (These Guidelines are pre-eminent a guidance in progressively expanding the scope of—and rationale underpinning—cultural heritage: "[t]he OGs can be modified to accommodate developments, including changes in the evolving concept of heritage value or significance. And indeed, in 1992, a new category of sites was introduced to the World Heritage Convention: the category of "cultural landscapes." This was a significant innovation, as it demonstrated the shift from monumental heritage to a more complex interaction between people and their environment); Francesco Bandarin, *International trade in indigenous cultural heritage: Comments from UNESCO in light of its international standard-setting instruments in the field of culture*, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 306, 309 (Christoph B. Graner et al. eds., 2012).

55. Guidance on Land-Use Planning, the Siting of Hazardous Activities and Related Safety Aspects, Economic Commission for Europe, U.N. Doc. ECE/CP.TEIA/35 (2017).

1992 Helsinki Convention[56] on the Transboundary Effects of Industrial Accidents (also known as "UNECE Industrial Accidents Convention") either, that the US has signed at least (with ratification "pending" *ad libitum*, as it is often the case with US-signed treaties). Another UNECE-sponsored treaty is the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (also known as "UNECE Water Convention"), whose scope encompasses the "landscape and historical monuments or other physical structures or the interaction among these factors[, as well as the] effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors."[57]

Placed at the forefront of the global environmentalist discourse, the EU represents this normative struggle between "culture" and "environment" at its best. Even if it followed up the 1979 CoE Convention on the Conservation of European Wildlife and Natural Habitats (also known as "Bern Convention") with its own Council Directive 92/43/EEC on the Conservation of natural habitats and of wild fauna and flora (also known as "Habitats Directive"),[58] and the interactions between the two "heritages" are obvious in these two mutually-shaping[59] legal instruments, Brussels still lacks a *coherent and comprehensive* piece of legislation (and background vision) about how to concretise and enforce such linkages:[60] its approach is still project-based.[61] In the field of archaeology only, "elements

56. Not to be confused with the 1974 Convention on the Protection of the Marine Environment of the Baltic Sea Area, known as "Helsinki Convention", as well, then revised in 1992 and entered into force on 17th January 2000 as "HELCOM Convention." In sum, there are three "Helsinki Conventions" which might cause confusion with each other: the HELCOM, the Industrial Accidents one, and the Water one. All of them have been signed in 1992.

57. Helsinski Convention on the Protection and Use of Transboundary Watercourses and International Lakes, art 1.2, Mar. 17, 1992. *See* James D. Fry & Agnes Chong, *International Water Law and China's Management of Its International Rivers*, 39 B.C. INT'L & COMP. L. REV. 227 (2019).

58. Nicolas De Sadeleer, *Assessment and Authorisation of Plans and Projects Having a Significant Impact on Natura 2000 Sites*, EU ENVIRONMENTAL AND PLANNING LAW ASPECTS OF LARGE-SCALE PROJECTS 281, 289–90 (Bernard Vanheusden et al. eds., 2016) (judicial application of the Habitats Directive).

59. Sebastian Oberthür et al., *Conceptual Foundations of Institutional Interaction*, INSTITUTIONAL INTERACTION IN GLOBAL ENVIRONMENTAL GOVERNANCE: SYNERGY AND CONFLICT AMONG INTERNATIONAL AND EU POLICIES 19, 30 (Sebastian Oberthür et al. eds., 2006).

60. *Scoping study on the review of links and complementary between Natura 2000 and cultural sites* (2010), https://perma.cc/CE62-8TTR.

61. *Preserving our Heritage, Improving Our Environment: Volume II – Cultural Heritage Research: FP5, FP6 and Related Project* (2009), https://perma.cc/RQ44-Z8QR; *see also*, Vasiliki Karageorgou, *The Permissibility of Projects for Interbasin Water Transfer under the Prism of the EU Water and Environmental Legislation*, ENVIRONMENTAL AND PLANNING LAW ASPECTS OF LARGE-SCALE PROJECTS 249, 249–77 (Bernard Vanheusden et al. eds., 2016).

of the archaeological heritage" are defined by the CoE as "all remains and objects and any other traces of mankind from past epochs [. . .] the preservation and study of which help to retrace the history of mankind *and its relation with the natural environment*;"[62] however, this expressed linkage reports mankind—and not archaeological discoveries directly—to the environment. Not infrequently, natural heritage sites perfectly overlap with cultural heritage ones,[63] to such an extent that a double-sided instrument which ties them together is warranted. The CoE itself remarked "the importance of handing down to future generations a system of cultural references, improving the urban and rural environment and thereby fostering the economic, social and cultural development of States and regions,"[64] thus binding States to making "the conservation, promotion and enhancement of the architectural heritage a major feature of cultural, environmental and planning policies."[65] The reader will have noted by now that this piecemeal approach still compartmentalises heritage in "archaeological", "architectural", and so forth, whilst to address threats arising from transboundary pollution and climate change, a single comprehensive instrument laying down clear-cut liabilities for all potential actors involved is urged for.

II.2 Loss of traditions, displacement of identities, sense of alienation

In English tort law, apart from physical injuries, non-physical yet quantifiable *pure* economic losses (those that appear on a balance-sheet, e.g., those to property) are opposed to *consequential* economic losses stemming therefrom (reputational damages, career slowdowns, etc.). All these losses concur to "stranding" the underlying assets.[66] Nevertheless, besides these damages which can be redressed monetarily, there exists a category of losses related to goods which cannot be translated into an "assets" language and cannot be traded; whilst international negotiations focus on the first category (economic losses), the second stands legally as a largely unregulated grey area.[67] Translating this scheme internationally, under the instrumental umbrella of environmental law, non-economic

62. Valletta Convention, June 1985, E.T.S 143, Art. 1(1).

63. *Natural and Cultural Heritage in Europe: Working together within the Natura 2000 Network* (2019), 13–16, https://perma.cc/JA3U-6TZ4.

64. Granada Convention, Oct. 3, 1985, E.T.S 121.

65. *Id.* at. Art.10.3.

66. *See* Ben Caldecott, *Introduction to Special Issue: Stranded Assets and the Environment*, 7 J. OF SUSTAINABLE FIN. & INV. 1, 2 (2017).

67. Andrea C. Simonelli, *The Ethical Challenges in the Context of Climate Loss and Damage*, ETHICAL VALUES AND THE INTEGRITY OF THE CLIMATE CHANGE REGIME 213, 216 (Hugh Breakey et al. eds., 2016).

losses—which may "include loss of life, human health, cultural heritage, ecosystem services and indigenous knowledge[, and] can occur as direct and indirect consequences of climate change, including negative side-effects of adaptation" call for solutions which go beyond the mere financial reparation or risk-transfer makeshifts: most of these losses, e.g., to traditional rituals, protected species and natural habitats, water and soil, are irreplaceable and unmonetizable, and shall be addressed by context-dependent policies freed from a market-efficiency mindset.[68] "Loss of cultural identity, sense of place or indigenous knowledge, for example, are inextricably tied to a community's integrity" and "no replica of the lost object will be regarded as equivalent to the original. [. . .] Whatever amount of money is paid to a harmed community, if the ends are irreplaceable, by definition such payments cannot make the community whole again."[69] Even the language spoken by indigenous communities is modelled on their habitat, their collective memory, comprising both natural and cultural heritage.[70] Anthropological studies have placed emphasis on this language-nature link, demonstrating for example how the native aborigines (*Indios*) of Amazonia coined and still keep sixteen (*sic*) different expressions to indicate the green colour,[71] or how in Colombia "an indigenous territory, although possibly demarcated and delimited, is defined not primarily by its borders and limits but by geographical marks which represent the bond between a group of humans, landscape and history."[72] This second example may also urge a rethinking of sovereignty in the shared management of cultural-environmental resources between indigenous and non-indigenous claimants.[73]

Article 8 of the Paris Agreement finally brought the issue under the spotlight, yet the Warsaw International Mechanism ("WIM") established to

68. *See* Olivia Serdeczny, THE ETHICAL CHALLENGES IN THE CONTEXT OF CLIMATE LOSS AND DAMAGE (DEUTSCHES INSTITUT FÜR ENTWICKLUNGSPOLITIK 2016).

69. Ivo Wallimann-Helmer, *The Ethical Challenges in the Context of Climate Loss and Damage*, LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 39, 50–1 (Reinhard Mechler et al. eds., 2019).

70. JANET MCINTYRE-MILLS, CRITICAL SYSTEMIC PRAXIS FOR SOCIAL AND ENVIRONMENTAL JUSTICE: PARTICIPATORY POLICY DESIGN AND GOVERNANCE FOR A GLOBAL AGE 48 (2003).

71. *See, e.g.*, MÁRCIA THEÓPHILO, NEL NIDO DELL'AMAZZONIA (Interlinea, 2015). Her anthropology-sensitive poetry production moulds an epic of the Amazonia, identifying and elucidating the implications of the loss of natural habitats as an impoverishment of language, habits, community, and ultimately identity. *See also* MÁRCIA THEÓPHILO, AMAZZONIA VERDE D'ACQUA (Mondadori, 2020); MÁRCIA THEÓPHILO, AMAZZONIA RESPIRO DEL MONDO (Passigli, 2005); MÁRCIA THEÓPHILO, FORESTA MIO DIZIONARIO (Tracce, 2003).

72. Juan Alvaro Echeverri, *Territory as Body and Territory as Nature: Intercultural Dialogue?*, THE LAND WITHIN: INDIGENOUS TERRITORY AND THE PERCEPTION OF ENVIRONMENt 230, 232 (Alexandre Surrallés et al. eds., IWGIA 2005).

73. *See* Austen L. Parrish, *Changing Territoriality, Fading Sovereignty, and the Development of Indigenous Group Rights*, 31 AM. INDIAN L. REV. 291, 291–313 (2007).

further the Conference's work on the matter has proven inefficient so far.[74] As "[c]limate change forces people to make choices and face situations that lead to radical, but not necessarily sustainable transformations of society,"[75] cultural heritage is under siege across all continents and its damage forms part of said transformations, which are unsustainable insofar as they transfer onto the next generations a poorer legacy from the past, as well as the burden of living in insufficiently rooted (thus often war-ravaged) civilisations. "Nuclear waste, hazardous waste disposal, the loss of biological diversity, and ozone depletion, for example, have significant effects on the natural and cultural heritage of more distant generations."[76] Hence, it is dutiful towards those yet to come that humans agree on legal systems which are capable of preserving the legacy of history and pass it on as integrally as possible. Whereas faults on climate change are rather difficult to apportion, cultural heritage should be legally shielded at least from transnational polluting activities liabilities thereof are possible to ascertain and settle. Indeed,

> [t]here are a number of factors that increase the need for transnational environmental cooperation. First, the breakup of countries means that some national environmental problems may become transnational concerns. Second, enhanced remote sensing and terrestrial monitoring can better spot transboundary environmental issues. Third, advances in technology can create new pollution problems, as in the case of [chlorofluorocarbons]. Fourth, population growth places stresses on ecosystems, which may affect multiple countries. Fifth, the rise of globalization and regionalism results in more trade and movement of factors of production, both of which can augment transnational pollution flows. Sixth, the enhanced importance of social media offers

74. "[T]he range of approaches to financing loss and damage response efforts listed in the initial two-year workplan for the WIM [Executive Committee] display major gaps: almost none were devised to apply to slow-onset events or to non-economic loss and damage. Traditional insurance is designed to provide compensation for monetary damages triggered by sudden, unpredictable and infrequent disasters. [. . . A]n insurance-based approach does not encompass an appropriate response to non-economic loss and damage. Risk insurance does not include any means to value or repay non-economic loss and damage, including loss of heritage, culture, languages and ecosystems. Social and economic development concerns should be central in proposals to address loss and damage." Jonathan Gewirtzman et al., *Financing Loss and Damage: Reviewing Options Under the Warsaw International Mechanism*, 18 CLIMATE POL'Y 1076, 1083 (2018); *see* Serdeczny *supra* note 68, at 8.

75. Mia Landauer & Sirkku Juhola, *Loss and Damage in the Rapidly Changing Arctic*, LOSS AND DAMAGE FROM CLIMATE CHANGE: CONCEPTS, METHODS AND POLICY OPTIONS 425, 429 (Reinhard Mechler et al. eds., 2019).

76. Edith Brown Weiss, *In Fairness to Future Generations and Sustainable Development*, 8 AM. U. INT'L L. REV. 345, 348 (1992).

environmental activists a powerful tool to coalesce public opinion to push for transboundary pollution control and agreements.[77]

II.3 Why "updating UNESCO" might not suffice

> The Parties shall encourage research, development, monitoring and cooperation related to [… t]he *identification of trends* over time and the scientific understanding of the wider effects of sulphur, nitrogen and volatile organic compounds and photochemical pollution on human health, including their contribution to concentrations of particulate matter, the environment, in particular acidification and eutrophication, and materials, *especially historic and cultural monuments*, taking into account the relationship between sulphur oxides, nitrogen oxides, ammonia, volatile organic compounds and tropospheric ozone [. . .].[78]

Cultural heritage sits under siege worldwide due to air and water pollution, (illegal) waste discharging, artificial noise, global warming, toxic emissions, and more generally, environmental degradation and climate change:[79] unprecedented sea storms, typhoons, and hurricanes, desertification, flooding, acid rain, rising sea levels, permafrost melting, land exploitation, oceans trash dump, extreme weather conditions and temperatures, coastal erosion, deforestation, and so forth, are causing irreparable damage to or even disappearance of valuable expressions of tangible and intangible heritage,[80] up to the true extremes of "cultural genocides." Acidification, eutrophication, and human toxicity have regional effects at worst, but climate change and ozone depletion are

77. Todd Sandler, *Environmental cooperation: Contrasting international environmental*, 69 OXFORD ECON. PAPERS 345, 348 (2017).

78. Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone art 8(g), May. 17, 2005, 81 U.N.T.S 2319 (emphasis added); *see also* Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emission art. 6(d), Aug. 5, 1988, 122 U.N.T.S 2030; "Concerned…" in the Preamble to the Protocol to the Convention on Long-Range Transboundary Air Pollution on the Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least 30 Per Cent, Sep. 2, 1987, 215 U.N.T.S 1480 (none of the other Protocols to the Convention on Long-range Transboundary Air Pollution mentions damage to monuments or other culturally, historically, artistically noteworthy sites).

79. JAMES NAFZIGER ET AL., TOWARDS A PRESERVATION-SUSTAINABILITY NEXUS: APPLYING LCA TO REDUCE THE ENVIRONMENTAL FOOTPRINT OF MODERN BUILT HERITAGE 253 (2010).

80. *See* Cristina Sabbioni et al., *Vulnerability of cultural heritage to climate change*, CoE Report AP/CAT 44, 10-11 (2008), https://perma.cc/XW6Z-2ZW2.

problems of global reach;[81] for example, higher ozone concentration causes the corrosion of heritage sites due to the oxidising ozone reactions.[82] Not rarely, "[t]he damage affects not only the artistic content of the work but also the [edifice] where […] the artifact has a supporting function" architecturally.[83] Tangible cultural heritage is susceptible to climate-change-induced damage due to two elements: the effects of this phenomenon on its constitutive materials (like in the case of acid rains[84]), and the massive consequences for the territory where it is located (such as flooding).[85] When on November 12, 2019 Venice experienced the second-gravest flooding in its history and the *Basilica di San Marco* was severely damaged, the mayor credited the regrettable event to climate change.[86] Intangible heritage cannot be directly affected, yet the legacy and practices that revolve around biodiversity, natural cycles (involving both flora and fauna), animal migrations, or manmade vestiges can be severely endangered by this set of phenomena.[87] Additionally, tangible heritage may bear meaning—or acquire a universal rather than local one, thus

81. Maria Karoglou et al., *Towards a Preservation-Sustainability Nexus: Applying LCA to Reduce the Environmental Footprint of Modern Built Heritage*, 11 SUSTAINABILITY 6147, 6159 (2019).

82. Stefan Doytchinov, *European UNESCO Cultural Heritage sites and the air pollution effects*, 14 AIR POLLUTION 645, 652 (2006); for a country case-study, see Augusto Screpanti & Alessandra De Marco, *Corrosion on cultural heritage buildings in Italy: A role for ozone?*, 157 ENVTL POLLUTION 1513, 1513–20 (2009).

83. Marco Del Monte, *The Cultural Heritage: Causes of damage*, SCIENCE, TECHNOLOGY AND EUROPEAN CULTURAL HERITAGE: PROCEEDINGS OF THE EUROPEAN SYMPOSIUM, BOLOGNA, ITALY, 13-16 JUNE 1989 78, 82 (1991).

84. GABRIELA KÜTTING, ENVIRONMENT, SOCIETY AND INTERNATIONAL RELATIONS: TOWARDS MORE EFFECTIVE INTERNATIONAL ENVIRONMENTAL AGREEMENTS 88 (2000).

85. By absurdity, if e.g., Venice sinks, the WHC is no longer applicable, and even the 2011 UNESCO Convention on the Protection of the Underwater Cultural Heritage only protects a cultural object after 100 years of being partially or totally immersed [Art.1.1(a)].

86. John Henley and Angela Giuffrida, *Two people die as Venice floods at highest level in 50 years*, GUARDIAN (Nov. 13, 2019), https://perma.cc/8XYP-JP39; *Acqua alta a Venezia, toccati 187 cm. Allerta Basilica di San Marco. Anziano fulminato [High Water in Venice]*, QUOTIDIANO (Nov. 12, 2019), https://perma.cc/B24E-HGNX. *See also* Jonathan Jones, *Venice has the battle against extreme weather down to a fine art*, GUARDIAN (Nov. 12, 2012), https://perma.cc/KQA2-6TD7; Tara Law, *It's Not Just Flooding in Venice. Here's How Climate Change Threatens World Heritage Sites Everywhere*, TIME (Nov. 22, 2019) https://perma.cc/7VBL-ATW5.

87. Elizabeth Thomas, *Protecting Cultural Rights in the South Pacific Islands: Using UNESCO and Marine Protected Areas to Plan for Climate Change*, 29(3) FORDHAM ENVTL L. REV. 413, 417–420, 440, 464 (2018) ("[i]n Papua New Guinea, many indigenous peoples believe that animals, plants, geographical features, and objects have spirits, tying their beliefs in those spirits to the natural world. [Similarly,] the Maasai tribes have an almost sacred relationship with cattle and the lands where their animals feed[,] one tribe on the island of Chuuk believes that their ancestors' spirits inhabit the coral reefs that surround their homes[, and [i]f the Chamorros cannot access their island, they risk losing access to where they believe their ancestral spirits reside.").

"upgrading" its "status" before the international community—*because of* its "association with events, living traditions, ideas, beliefs or artistic and literary works of outstanding universal significance."[88] One consequence is that relocating immovable heritage highly decreases its context-dependent value,[89] so much that its uniqueness might be rendered meaningless. In fact, "[t]he 'lived experience of culture', the 'identity', 'belonging', and 'sense of place' together with the values, traditions, and cultural practices need to be taken into consideration to determine the acceptability of the climate change adaptation solution."[90] This notwithstanding, the reader is advised that cultural practices revolving around monuments (or other types of "physical" heritage) are, from an economic and status-appraising perspective, not necessarily value-enhancing, due to the "predisposition" of certain tangible heritage to be neglected, deserted, damaged, or even destroyed by the very same people who crafted it in the first place, as part of a cultural ritual which might prove hard to understand, yet shall be never interfered with:

> We can all sit around and nod our heads sagely when we are told that the destruction by the Zuni of their war gods forms part of a cultural practice that should be respected and that the attempt to preserve these gods would be culturally disrespectful; or likewise, when the Igbo people destroy their *mbaris* as part of a cultural practice, after having painstakingly erected them. Yet no such indulgence was evident when the *Taliban* regime in Afghanistan dynamited the World Heritage-listed, sixth century Buddhas of Bamiyan, having described them as being "idols" and thus religiously offensive. The cases clearly have significant differences, one of the more important in cultural terms being that the *Taliban* were destroying something that belonged not to their own culture, but arguably to someone else's, although they claimed a cultural imperative for the act of destruction.[91]

88. Rosemary J. Coombe et al., *Indigenous Cultural Heritage in Development and Trade: Perspectives from the Dynamics of Cultural Heritage Law and Policy*, INTERNATIONAL TRADE IN INDIGENOUS CULTURAL HERITAGE: LEGAL AND POLICY ISSUES 272, 284 (Christoph B. Graber et al. eds., 2012).

89. CHERYL BENARD, ELI SUGARMAN, & HOLLY REHM, CULTURAL HERITAGE VS. MINING ON THE NEW SILK ROAD? FINDING TECHNICAL SOLUTIONS FOR MES AYNAK AND BEYOND. Conference Report, June 4–5, 2012, School of Advanced International Studies, Johns Hopkins University 41–42 (Central Asia-Caucasus Institute, 2012).

90. Elena Sesana, et al., *Adapting Cultural Heritage to Climate Change Risks: Perspectives of Cultural Heritage Experts in Europe*, 8 GEOSCIENCES 305, 320 (2018).

91. Fiona Macmillan, *The protection of cultural heritage: Common heritage of humankind, national cultural "patrimony" or private property?*, 64(3) N. IR. LEGAL Q. 351, 355 (2013).

In sum, there are potentially countless variables to consider when attaching economic value to cultural heritage for the purpose of e.g., quantifying damages (thus requesting appropriate compensation), splitting liabilities, or assessing insurance-covered risks. Value variation may be attributed to tangible heritage depending on the intangible practices that either valorise or risk compromising said heritage's survival and prosperity. Furthermore, heritage of universal value calls for aggravated guardianship and financial burdens on its custodians, and insuring it against serious damage up to destruction might be impractical even for States; such heritage is, so to speak, of common concern for mankind.[92]

Besides the tangible/intangible dichotomy, which has already been problematised elsewhere[93] and comes as particularly inappropriate to appreciate the interpenetrations between nature and monuments through non-Western lenses,[94] a possibly more relevant distinction is that between movable and immovable objects; the former UNESCO's Chief of Legal and Treaty Section (International Standards) so recalls:

> The fact that in many countries Cultural Heritage and property is often protected by legislation does not, *per se*, exclude the climate change threats. First, with regard to immovable Cultural Heritage, the law cannot remove it from its *situs* and protect it fully from the impact of nature. Second, with regard to movable cultural property, the law can organize a removal of the property from its *situs* and its gathering in museums, which does protect from most, not all, impacts of nature. However, museums can hardly protect from flooding or other serious effects of climate change. For instance, some museums in the Czech Republic had

92. Thomas Cottier et al., *The Principle of Common Concern and Climate Change*, *52 A.V.R. 293, 297–298, 301–302 (2014)* ("In the international law discourse, Common Concern is generally discussed as distinct from the doctrine of common heritage of mankind [. . .]. Yet, its role and contents have not been clarified. It has been discussed as a potential foundation of a human right to the environment. While often limited to environmental law, the concept has also been put forward as a foundation for international human rights protection in general[, but] its relationships to public goods and to other legal principles have not been explored[, included vis-à-vis tangible heritage . . .]. Recourse to Common Concern both in the literature and in treaty language suggests that it stands for the proposition of a shared problem and shared responsibility, and for an issue which reaches beyond the bounds of a single community and [S]tate as a subject of international law. [. . . In any case,] Common Concern does not fundamentally alter the paradigms of permanent sovereignty over natural resources and of territoriality. But it may modify jurisdictional boundaries in assuming enhanced and shared responsibilities among [S]tates.").

93. *See, e.g.*, Riccardo Vecellio Segate, *Reconceptualising Musical Treasures in Italy, the EU and the World: The Functional Legacy of Performativity*, 24 ART ANTIQUITY & L. 199, 209 (2019).

94. KAROLINA KUPRECHT, INDIGENOUS PEOPLES' CULTURAL PROPERTY CLAIMS: REPATRIATION AND BEYOND 42 (2014).

> to face unexpected floods. [. . .] But climate change can do more than flooding a territory, including museums and collections. From a legal perspective, it could go as far as cancelling a territory which is one of the constitutive elements of a State. [. . .] Any cultural property still on the territory would self-evidently no longer be legally protected by national legislation nor by international law […].[95]

The same Author observed that at the time they were negotiated, most UNESCO-sponsored intergovernmental binding instruments were not ready to identify climate change as a key future challenge, and this might explain the lack of specific commitments to preserving cultural heritage from climate change-related threats.[96] He also argues it is common sense for States to read the relevant Conventions in light of current trends,[97] yet he fails to acknowledge that an international legal order is in place exactly for avoiding risky overreliance on States' "common sense," which far too often derails from the common good to seek short-term political gains instead. Moreover, most States do not have the means to act *sua sponte*,[98] as they are traversed by civil conflicts which intensify climate-change dangers by multiplying the sources of instability. The case of Mali is exemplary in this respect; terrorist contempt to monuments has already been addressed and satisfactorily described by—*inter alia*—the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[99] and the International Criminal Court ("ICC"),[100] yet such terrorist attacks act in combination with environmental forces:

> the three mosques of Djingareyber, Sankoré and Sidi Yahia in Timbuktu, Mali [. . .], bear testimony to the physical and social

95. Guido Carducci, *What Consideration is Given to Climate and to Climate Change in the UNESCO Cultural Heritage and Property Conventions?*, CLIMATE CHANGE AS A THREAT TO PEACE: IMPACTS ON CULTURAL HERITAGE AND CULTURAL DIVERSITY 129, 130 (Sabine von Schorlemer and Sylvia Maus eds., 2014).

96. *Id*. at 137.

97. *Id.* at 139.

98. Indeed, even Art.5 WHC contains *progressive* rather than *absolute* obligations, in line with the general phrasing of economic, social and cultural rights in public international law. Chechi, *supra* note 52, at 187–188.

99. *See* Serge Brammertz et al., *Attacks against Cultural Heritage as a Weapon of War: Prosecutions at the ICTY*, 14(5) J. OF INT'L CRIM. JUST. 1143, 1168 (2016).

100. *See* Derek Fincham, *Intentional Destruction and Spoliation of Cultural Heritage Under International Criminal Law*, 23 U.C. DAVIS J. INT'L L. & POL'Y 149, 183–88 (2017); Karolina Wierczyńska and Andrzej Jakubowski, *Individual Responsibility for Deliberate Destruction of Cultural Heritage: Contextualizing the ICC Judgment in the Al-Mahdi Case*, 16 CHIN. J. INT. LAW 695 (2017); Yaron Gottlieb, *Attacks Against Cultural Heritage as a Crime Against Humanity*, *Case Western Reserve Journal of International Law*, 52 CASE W. RES. J. INT'L L. 287 (2020).

> impacts of climate change (*desertification*). On the one hand, projected changes show that in the future the area of Timbuktu will face a decrease in average rainfall and an increase in atmospheric temperature, which will surely contribute to desert encroachment and sand blown damage. Another climate factor that deserves attention is the increase in extreme precipitation events. Heavy rains in 1999, 2001 and 2003 damaged or caused the collapse of traditional earthen buildings and mud mosques. Moreover, the desertification in the region of Timbuktu is an important source of stress to the three mosques because it might lead the migration of the local population, including the local craftsmen, which are involved in the restoration process of the mud structures of the mosques.[101]

The WHC is regrettably fraught with loopholes: first, the State where a listed heritage in danger is located ("primary State") bears primary but not exclusive responsibility over its protection;[102] second, the complimentary protection of other States may enter into play only under consent of *and upon request by* the primary State;[103] third, all those "other States" are obliged not to *deliberately* violate such heritage,[104] whilst might do so "accidentally." These formulations result in the fact that no State—neither the primary one, nor the others—bears unqualified obligations to protect cultural heritage: the obligations of the primary State are non-exclusive and dependent on its resources, those of the others can go unfulfilled whenever the primary State does not permit foreign interferences and whenever damaging actions are not voluntary. The "international community" has no *right* to intervene, either, [105] although it might well have residual legal *interests* to protect. As such, a more contemporary reading of the Convention is not enough: this instrument needs to be rewritten substantially; it is the epitome of a treaty whose high compliance rates indicate weakness (of the treaty requirements) rather than effectiveness (in the accomplishment of its purpose).[106]

101. Chechi, *supra* note 52, at 167. The last sentence from this quotation also unearths the delicate interrelationship between the tangible (mosques) and intangible (artisanship) expressions of the same heritage.

102. 1972 UNESCO World Heritage Convention, *supra,* note 53, at Art.4.

103. *Id.* at Art.6(2).

104. *Id. at* Art.6(3).

105. Roger Michael O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 INT'L & COMP. L. Q. 189 (2004).

106. Edward J. Goodwin, *The World Heritage Convention, the Environment, and Compliance*, 20 COLO. J. INT'L ENVT. L. & POL'Y 157, 189 (2009).

Other instruments related to broad interpretations of human rights treaties are more and more invoked too, often unsuccessfully;[107] however, said mechanisms do "not allow either the protection of the environment *per se* nor an ordinary compensation of the damage caused *to* the environment."[108] This is why, from a doctrinal viewpoint, even seeking to protect cultural heritage by recourse to environmental law might not necessarily suffice, unless it is clearly argued that the damage to a monument—similarly to that to an ecosystem—constitutes a violation of legal rights held by *specifically identifiable* individuals or collective groups.[109] In the cultural heritage field, though, pleading successfully is even harder: in the *Ahunbay* case, the Court in fact confuted the existence of an individual right to cultural heritage preservation,[110] and nothing would have changed if the site were a UNESCO-listed one; the dam was delayed because of legal claims submitted by NGOs and sponsors framing the issue *in environmental terms* (even though the prospected flooding of that heritage would have been artificially caused),[111] exactly because the cultural-heritage protection framework is legally flawed.[112] Claims *erga*

107. *See* Ottavio Quirico, Jürgen Bröhmer, & Marcel Szabó, *Linking trade and climate change: What room for human rights?*, CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL AND COMPARATIVE LAW PERSPECTIVE 7, 25 (Ottavio Quirico and Mouloud Boumghar, eds, 2016); Ottavio Quirico, *Systemic integration: Between climate change and human rights in international law?*, 35 NETH. Q. HUM. RIGHTS 31 (2017); BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS AND CLIMATE CHANGE: CURRENT STATUS AND FUTURE PROSPECTS (2018); KEN CONCA, AN UNFINISHED FOUNDATION: THE UNITED NATIONS AND GLOBAL ENVIRONMENTAL GOVERNANCE 119–147 (2015); Alan Boyle, *Climate Change, the Paris Agreement and Human Rights*, 67 INT. COMP. LAW Q. 759 (2018).

108. Sandrine Maljean-Dubois, *International Litigation and State Liability for Environmental Damages: Recent Evolutions and Perspectives*, CLIMATE CHANGE LIABILITY AND BEYOND 27, 47 (Jiunn-rong Yeh [台大法律系] ed., 2017).

109. Horatia Muir Watt, Private International Law beyond the Schism, 2 TRANSNAT'L LEGAL THEORY 347, 388 (2011) ("Especially in Europe, where private international law claims arising out of transboundary pollution of monuments benefit from «the EC Rome II Regulation, which ensures by means of an option opened for the claimant that the most compensatory—and therefore the most pollution-repellent—law will apply.").

110. Zeynep Ahunbay et al. v. Turkey, App No. 6080/06 HUDOC (Jan. 29, 2019), https://perma.cc/DXY2-W3E9. An essential summary can be found at https://perma.cc /7ECG-ZUCL.

111. Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183, 233–235 (2003).

112. *See generally* Sarah Mason-Case, *On being companions and strangers: Lawyers and the production of international climate law*, 32 LEIDEN J. INT'L L. 625 (2019) (transnational networks of environmental lawyers are more active and organised compared to cultural-heritage ones, thus proving more effective in both lawyering per se and lobbying); *see also* Pascal Olivier Girot, *The Darien Region Between Colombia and Panama: Gap or Seal?*, HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTS AND NORMS IN A GLOBALIZING WORLD 172, 190 (Lyuba Zarsky ed., 2002) (example of combined environmental-heritage mobilisation).

omnes[113] need to be substantiated with evidence that the damaged site was considered of universally outstanding value for the artistic memory of mankind. And even so, as demonstrated by further leading case-law, it is extremely arduous to enforce a supposedly universal legal entitlement to protect certain goods or sites:[114] a decision issued by the German Federal Constitutional Court in 2007[115] regarding the Elbe Valley proves these difficulties at their best, insofar as a WHL site was endangered by a dismissive street consultation and no public institution in Germany proved able to comply with the State's obligations under the 1972 Convention.[116] No liability of Germany for this mismanagement was established before the "international community," the only consequence being the dropping of the site from the List[117] (which simply spirals a vicious circle of non-protection).[118] When a WHC site is listed as "in danger", the best the Convention allows for is a relatively small contribution towards adaptation costs for adjusting policies;[119] as such, no compensation is provided: neither by third countries (e.g., major world polluters) to the primary State for the negative repercussions of climate change, nor by the primary State to the "international community" when the damage occurs domestically (e.g., because of negligence in exercising due diligence). This notwithstanding, in a few occasions the political blaming which accompanies a site's (forthcoming) registration on the List of World Heritage in Danger does trigger wiser decision-making from governmental authorities, like with the case of Lake Baikal and a pipeline rerouting across Siberia.[120] As for the Special Climate Change Fund established by the Conference of the Parties

113. *See* Alessandro Chechi, *Risks Relating to the Protection of Cultural Heritage: From Climate Change to Disasters*, LEGAL RISKS IN EU LAW: INTERDISCIPLINARY STUDIES ON LEGAL RISK MANAGEMENT AND BETTER REGULATION IN EUROPE 199, 218 (Emilia Mišćenić, Aurélien Raccah eds., 2016).

114. Andrzej Jakubowski, *Resolution 2347: Mainstreaming the protection of cultural heritage at the global level*, 48 QUEST. INTL. L. 21, 26 (2018).

115. Bundesverfassungsgericht, 2 BvR 695/07, (Decision of May 8, 2007).

116. Christian J. Tams, *Addendum to the "Cultural Heritage of Mankind" Entry*, A CONCISE ENCYCLOPAEDIA OF THE UNITED NATIONS 50, 51 (Helmut Volger, ed. 2nd ed, 2010).

117. Caroline Y. Robertson, *Cultural Heritage of Mankind" Entry*, SUSTAINABLE DEVELOPMENT: RELATIONSHIPS TO CULTURE, KNOWLEDGE AND ETHICS 175, 183–184 (Oliver Parodi, Ignacio Avestaran, Gerhard Banse eds., 2011); *see* Battini, *supra* note 13, at 356–357.

118. *See* Diana Zacharias, *Cologne Cathedral versus Skyscrapers – World Heritage Protection as Archetype of a Multilevel System*, 10 MAX PLANCK UNYB 273, 318–322 (2006) (on the removal of properties from the WHL).

119. RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY 217 (2005).

120. *See* Battini, *supra* note 13, at 354–355.

to the UNFCCC and also covering adaptation costs,[121] it seems *prima facie* inapplicable to cultural heritage and is anyway limited to assisting developing countries.

II.4 Coupling enemies: regulatory compliance and wartime overfocus

When harm occurs notwithstanding compliance with relevant regulations, inter-regime (i.e. based on both environmental law and cultural heritage law) submissions are important also because court shields often come from "regulatory compliance defence" and evidentiary challenges related thereto,[122] which may involve either domestic or international regulations and foster instances of "regime shopping." Acceptance of this defence by international/domestic courts depends on several factors, e.g., on whether the regulation at hand was a "standard" or a proper law (e.g., administrative order);

> [t]he idea is that the administrative authority, when granting a licence and setting permit conditions, cannot take into account the possible harm that the licenced activity might cause to all possible third parties. […] Meeting the conditions of a permit is just a minimum. A plant owner has to take all possible precautions as required by tort law in order to avoid causing harm to third parties through his licensed activity. [Moreover,] the non-responsibility of a [S]tate based on the fact that it complied with international law is without prejudice to its liability under domestic law, or to the liability of private actors that may have acted in compliance with standards based on the international agreement. [Similarly, but to the opposite effect,] when the rule of international law on which the claim is based is incorporated in domestic law, it does retain its international character.[123]

These considerations would obviously sound too risky and unpredictable for any entrepreneur to run a business, which is why too many environmental cases are still settled amicably (i.e. extrajudicially) by

121. Global Environment Facility Council, GEF/C.24/12 (Oct. 15, 2004), *Programming to implement the Guidance for the Special Climate Change Fund adopted by the Conference of the Parties to the United Nations Framework Convention on Climate Change at its Ninth Session*, ¶ 17(a), 40–57, https://perma.cc/B8BX-CEXL.

122. Jutta Brunnee, *Of Sense and Sensibility: Reflections on International Liability Regimes as Tools for Environmental Protection*, 53 INT'L & COMP. L. Q. 351, 354 (2004).

123. André Nollkaemper, *Cluster-litigation in cases of transboundary environmental harm*, CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 11, 26–27, 32 (Michael G. Faure, Song Ying, eds., 2008).

applying equitable criteria for redressing a caused damage without incurring in other legal consequences.

Another limit that makes the application of international liability schemes taxing in practice is the overfocus of relevant international laws on conflict situations.[124] This is a long-standing bias in China, too:

> There is one great law to protect [the patrimony]. In times of military invasion, the people from other countries cannot take or destroy it. Those who destroy it can be forced to make reparations. This is called international law.[125]

Yet, the most telling example is that when UNESCO was founded, its primary mission was identified in post-war reconstruction and rehabilitation,[126] such a legacy producing consequences still today. "The drafters of the World Heritage Convention actually deleted the phrase "in time of peace" from the agreement."[127] Differently from that of the environment,[128] the protection of cultural heritage suffers from an unbalanced emphasis placed on wartime instruments[129] and, within the

124. *See* Christopher Greenwood, *State Responsibility and Civil Liability for Environmental Damage Caused by Military Operations*, 69 INT. LAW STUD. 397, 397–415 (1996), for an overview of these laws.

125. Translated excerpt from a letter by the entrepreneur Zhāng Jiǎn [张謇] to some of his Chinese friends, dated approximately 1890, as reported in Lisa Claypool, *Zhang Jian and China's First Museum*, 64 J. ASIAN STUD. 567, 570 (2005).

126. MIRIAM INTRATOR, BOOKS ACROSS BORDERS: UNESCO AND THE POLITICS OF POSTWAR CULTURAL RECONSTRUCTION, 1945–1951, 2–6 (2019).

127. Wangkeo, *supra* note 111, at 200.

128. Mansour Jabbari-Gharabagh, *Legal Perspectives for the Protection of the Environment Against the Effects of Military Activities During International Armed Conflict*, PhD thesis (Université Laval, 1997) 94, https://perma.cc/44ZY-CH7T; *see* Arie Afriansyah, *State Responsibility for Environmental Damage during International Armed Conflict Post the UNCC*, 10 INDONESIAN J. INT'L L 377 (2013); *see also* Arie Afriansyah, *The Adequacy of International Legal Obligations for Environmental Protection during Armed Conflict*, 3 INDON. L. REV. 55 (2013). The UN International Law Commission, https://perma.cc/3ETB-8NKX (see the outcomes and proceedings of their work); Bernard K. Schafer, *The Relationship between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct Are Permissible during Hostilities*, 19 CAL. W. INT'L L.J. 287 (1989) (to trace the development of the law through a military prism, referring to this less recent analysis might be of interest).

129. *See generally* Caitlin V. Hill, *Killing a Culture: The Intentional Destruction of Cultural Heritage in Iraq and Syria under International Law*, 45 GA. J. INT'L & COMP. L. 191 (2016); DAVID JAMES BEDERMAN, GLOBALIZATION AND INTERNATIONAL LAW 120 (1st ed. 2008); David Keane, *The Failure to Protect Cultural Property in Wartime*, 14 DEPAUL J. ART, TECH. & INTELL. PROP. L. 1 (2004). Interestingly, framing massive destruction of cultural heritage in environmental law terms might prove convenient even in terms of "responsibility to protect", as the latter can be invoked for environmental crimes, whilst it appears difficult to argue it would be invokable for damage to cultural heritage per se.

humanitarian context, on the distinction between military and non-military targets.[130] Besides UNESCO[131] and non-UNESCO[132] declarations, conflict-centred *binding* provisions include the 1949 Geneva Conventions and the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, but also, more recently, the 2017 UN Security Council Resolution 2347 and the "semi-binding" UN General Assembly ("UNGA") Resolution 2199 on Iraq, in 2015.

> However, at least with regard to gross violations of the international obligation to respect cultural heritage—such as the intentional destruction of monuments of universal importance—it seems that an *opinio juris* as to their unlawful character also in peace time is emerging. This is witnessed by the world-wide condemnation of the acts of destruction by the Taliban of the great Buddha of Bamyam in 2001. It is confirmed by the […] resolve that has led to the unanimous adoption in 2003 of the UNESCO Declaration Concerning Intentional Destruction of Cultural Heritage. This declaration is an instrument of soft law.[133]

The reader must have noticed that the stakes remain very high: the destruction must be *intentional*, and the applicable monuments are only

130. *E.g.,* Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People*, 15 J. MARSHALL REV. INTELL. PROP. L., 336, 365–367 (2016).

131. Such as the 2015 Saint Petersburg Declaration on the Protection of Culture in the Areas of Armed Conflicts.

132. Like the 2016 Abu Dhabi Declaration on Heritage at Risk in the Context of Armed Conflicts, promoted by ICOSMO.

133. Francesco Francioni, *Beyond State Sovereignty: The Protection of Cultural Heritage as a Shared Interest of Humanity*, 25 MICH. J. INT'L L., 1209, 1219 (2004). Notably, Art.2(1) of this Declaration provides for the protection of "cultural heritage linked to a natural site."

those whose *universal importance* is acknowledged.[134] Regionally, luckily, the threshold may be significantly lower; this is the case in Europe, where the scope[135] of the 2017 CoE Convention on Offences relating to Cultural Property "merges" those of the 1972 UNESCO World Heritage Convention and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, thus including both movable and immovable objects and disapplying any distinction between armed conflicts and peacetime. Unfortunately, the international community seems not yet ready to uphold comparably wide stances at the global level, and the CoE Convention itself was ratified by Cyprus and Mexico only – the second ratifier should not surprise insofar as the Convention is open to non-Council members too, mostly by invitation.[136] In sum, this Convention has not yet entered into force, and arguably several decades will go by before it achieves substantial consensus, if ever; meanwhile, heritage under siege due to environmental reasons cannot wait, which is why a recourse to environmental legal tools is rendered unavoidable. What is more, the Convention provides for sanctions and criminal penalties without designing a proper liability regime for damages whose individual *dolus* or state responsibility cannot be ascertained.

134. *See* Ayman Abdel Tawar, *The Assessment of Historic Towns' Outstanding Universal Value Based on the Interchange of Human Values They Exhibit,* 2 HERITAGE 1874 (2019) (explaining the current and potential criteria for insulating universally valuable heritage from "the rest"); Kati Lindström, *Universal heritage value, community identities and world heritage: Forms, functions, processes and context at a changing Mt Fuji,* 44 LANDSC RES. 278 (2019); Patrick R. Patiwael, Peter Groote, Frank Vanclay, *Improving heritage impact assessment: An analytical critique of the ICOMOS guidelines*, 25 INT. J. HERITAGE STUD. 333 (2019); Alice Palmer, *Legal Dimensions to Valuing Aesthetics in World Heritage Decisions*, 26(5) SOC. & LEGAL STUD. 581 (2017); *see also* Lynn Meskell, Claudia Liuzza, Enrico Bertacchini, Donatella Saccone, *Multilateralism and UNESCO World Heritage: Decision-making, States Parties and political processes*, 21 INT. J. HERITAGE STUD. 1 (2015) (on the politics underpinning the List's inscriptions); Enrico Bertacchini, Claudia Liuzza, Lynn Meskell, Donatella Saccone, *The politicization of UNESCO World Heritage decision making,* 176 PUBLIC CHOICE 95 (2016) ("Universality" is sometimes recognised only after reconstruction of demolished heritage, as its value lies in the testimony of post-war rebuilding and possibly reconciliation); *see* Harold Kalman, *Destruction, mitigation, and reconciliation of cultural heritage*, 23(6) INT'L J. HERITAGE STUDIES 538, 543 (2017).

135. Council of Europe Convention on Offenses relating to Cultural Property, art. 2(a), 2(b), May 19, 2017.

136. *Id.* at art.27(1); 28(1); *see also* Explanatory Report, at ¶ 149, https://perma.cc/7Z6Z-WZXX.

II.5 From the environment to culture, and back

The previous sections demonstrated that protecting cultural heritage by recourse to IEL may help, but it is not free from loopholes, as the latter field is still embryonical. Bearing this in mind, what other practical elements of IEL may cultural heritage law draw inspiration from? First, several soft-law instruments drafted by the United Nations Environment Programme ("UNEP") establish *international* environmental impact assessment's "soft obligations," by calling for issuing environmental impact assessments ("EIAs") before executing all projects likely to significantly impact the environment, where such an environment is understood in a comprehensive fashion as to incorporate cultural practices and monuments.[137] Even the 1982 United Nations Convention on the Law of the Sea ("UNCLOS"), that protects also cultural heritage,[138] might be deemed to implicitly suggest the adoption of EIAs.[139] The existence of EIAs is one of the key reasons why cultural heritage protection should be incorporated in the environmental law regime or framed in environmental protection language; indeed, no comparable procedure exists for the prevention of negative impact on cultural heritage internationally, and in any respect, the combined effects of the two harms would be more persuasive arguing. Cases where *ex ante* assessments of potential perilousness have proven decisive are uncountable, and cultural heritage protection usually succeeds when it forms part of EIAs-resulting objection claims. In Europe, the case of the rejected construction of the hydroelectric power plant "Buk-Bijela" between Serbia and Montenegro represents an enlightening example of transboundary occurrence shaped by strategic environmental assessments, whose outcome was the preservation of the UNESCO-protected "Durmitor" National Park along the Tara River.[140] The same can be affirmed with regards to countless other *loci amoeni*, such as the ancient Albanian port city of Durrës, displaying vestiges from the Greek, Hellenistic, and Roman dominations; there, it proved "useful for both policy and practical purposes to consider cultural heritage protection

137. ALASTAIR NEIL CRAIK, THE INTERNATIONAL LAW OF ENVIRONMENTAL IMPACT ASSESSMENT: PROCESS, SUBSTANCE AND INTEGRATION 133–141 (1st ed. 2008)(With reference to the US, the amended National Environmental Policy Act, at §101[b](2,4), provides that "[t]he Federal government use all practicable means [. . .] to assure for all Americans safe, healthful, productive and *aesthetically and culturally pleasant* surroundings [. . . and to] preserve important historic, cultural, and natural aspects of [their] *national* heritage.") (emphasis added).

138. Arts. 149; 303.

139. Gerd Winter, *International Principles of Marine Environmental Protection*, HANDBOOK ON MARINE ENVIRONMENT: PROTECTION SCIENCE, IMPACTS AND SUSTAINABLE MANAGEMENT 585, 599 (Markus Salomon & Till Markus eds., 2018).

140. *See* Kalezić, *supra* note 42, at 220–224.

law not as a separate concept but as an integral part of environmental law as a whole."[141]

Along similar rails, cultural heritage protection claims succeeded when pleaded jointly with environmental considerations in leading arbitration cases:

> [i]n *Glamis Gold* (2009) […], the ICSID tribunal rejected the claim of a Canadian company that the stringent regulations adopted at the federal and state levels on the conduct of mining operations in California would amount to indirect expropriation and breach of legitimate expectations of the foreign investor. The cultural value of the mining site as ancestral land of a tribal community of Native Americans, *together with compelling environmental considerations*, was a factor in support of the legitimacy of the regulatory measures imposed by the United States' authorities in view of protecting the environment and landscape value of the relevant territory.[142]

This aligns with the linkages between energy and the environment, witnessing virtually no claim submitted to the Permanent Court of Arbitration for purely environmental matters and yet incorporating environmental chapters (e.g., on environmental sustainability or remedies for environmental damage) as a substantial argument of energy submissions.[143]

The concept of *in dubio pro natura*—spillovering terminologically (yet reversed conceptually) from the *in dubio pro reo* adjudicating rationale in criminal trials—has been recognised as a valid principle of environmental law in several civil liability cases all around the world;[144] coherently, one might make the case for an *in dubio pro monumento*[145] (or *in dubio pro cultura*) principle in cultural heritage law.

As for the reverse, that is, environmental protection by means of cultural heritage provisions, corporations can lay the foundations of more

141. Helga Turku, *Cultural Property, Human Rights, and Sustainable Development: The Case of the Ancient City of Durres*, 25 HASTINGS ENVT'L L.J. 121, 138 (2019).

142. Francioni, *supra* note 49, at 19 (emphasis added).

143. *See* Tamar Meshel, *Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment: Permanent Court of Arbitration (PCA)*, MAX PLANCK ENCYCLOPAEDIA OF INTERNATIONAL PROCEDURAL LAW [MPEiPro] § 15 (2016).

144. Yann Aguila, Jorge Enrique Viñuales, *A Global Pact for the Environment: Conceptual Foundations*, A GLOBAL PACT FOR THE ENVIRONMENT: LEGAL FOUNDATIONS 12, 18 n.44 (Yann Aguila, Jorge Enrique Viñuales eds., 2019).

145. George Suetonio Ramalho, A tutela jurídica do patrimônio histórico e cultural: O exemplo do Centro Histórico de João Pessoa 49 (2016) (MSc thesis, Universidade Católica De Santos); Fabiana Santos Dantas, O direito fundamental à memória 75 (2008) (PhD thesis, Universidade Federal de Pernambuco)

grounded client bases via adding the non-profit dimension of protecting cultural heritage, whose preservation yields the safety of consumers' feelings of belonging and sense of roots; this "trust capital" spills over environmental protection up to ensuring the sustainable development of and "fidelity" to the business. Such a process is profitable, as enterprises are increasingly realising that profit must be guided by "the accumulation of institutional, relational, moral and spiritual capital in society as constituent parts of their total impact on social capital."[146] Any public-private partnership based on trust cannot neglect liability schemes designed to cater for prompt and full restoration and compensation in the event of environmental and/or cultural damage.

III. International legal framework on (environmental) liability of States

Although international (personal and state) liability remains understudied, it represents an essential redress mechanism in environmental and cultural heritage law: in these fields, international responsibility is a device of declaratory normative effect, yet it often provides no satisfactory risk-shifting and cost-allocation strategy portfolio for countries to rely upon. *Damnum infectum est damnum nondum factum, quod futurum veremur*.[147] Redress should compensate for both pecuniary and non-pecuniary losses, whenever applicable. Time-wise, it might either account for the passing of time (beyond the elementary restoration of the *status quo ante*, provided *that* restoration is even achievable), or result from less expensive cost-effectiveness calculations when the worth of the damaged heritage would not significantly exceed the costs for its restoration. Furthermore, reparation should take into account social costs (such as community dispersion, cultural displacement, group identity alienation), to be identified against the backdrop of wider implications for indigenous communities' livelihood as well as their coping and adaptation capabilities (drawing on the language of the Paris Agreement). Additional cost items may originate in the touristic value of the damaged site/tradition (for instance, as a share of the annual average of the local GDP), in other developmental considerations, and in the economic equivalence of the future potential legitimate exploitation of said site/tradition that the population concerned would have put in place would the damage not have been perpetrated.

146. Michael Pollitt, *Green Values in Communities: How and Why to Engage Individuals with Decarbonization Targets*, GREEN BUSINESS, GREEN VALUES, AND SUSTAINABILITY 67, 77 (Christos N. Pitelis et al. eds., 2011).

147. Nuclear Test (Australia v. France), Judgment, 1974, I.C.J. 389 (Dec. 20, 1975) (de Castro, J., dissenting).

The rationales supporting the case for liability application might vary widely:[148] liability can function as an economic incentive for compliance with environmental obligations; as a sanction regime for damaging—yet not internationally wrongful—conduct; as a corrective mechanism to restore environmental assets to their previous conditions; and as a Pigouvian strategy against the externalisation of a State's hazardous environmental choices. Specularly, it could work for internalising environmental, social, and insurance costs into production processes, this way implementing the polluter-pays principle (a flagship norm for the EU) and functioning as a post-damage or parametric risk-pooling factor.[149] But it is not only a strictly legal matter: framing cultural heritage claims against liability schemes employed in environmental affairs allows one to grasp the underlying goals of rhetorical devices used in politics across multiple fields. Curiously, not even the crafting of soft norms such as the 1972 Stockholm Declaration[150] was deemed appropriate a mechanism for reaching consensus over detailed liability rules, implying they would be better left to case-by-case political adjustment between the parties.[151] Moreover, the same Declaration does not expressively refer to either natural or cultural heritage: only the former was indirectly referred to in Principle 4, satisfying a request advanced by the Indian delegates.[152]

III.1 Forms of liability and related terminological uncertainties

Two inextricable elements constitute the cause of action of State liability: the objective element materialized through the violation of an international rule (the wrongful act), and the subjective element, made of the linkage which relies this wrongful act to its author State (the causal link). The objective element

148. *See also* UNGA, Report of the UN Secretary-General on the "Gaps in international environmental law and environment-related instruments: Towards a global pact for the environment," UN Doc. A/73/419 (Nov. 30, 2018) ¶ 94.

149. *See* Morten Broberg, *Parametric loss and damage insurance schemes as a means to enhance climate change resilience in developing countries*, 20 CLIM. POL. 693, 694–696 (2020) (explaining the difference between parametric and post-damage risk-pooling insurance criteria).

150. *See* Günther Handl, *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992*, United Nations Audiovisual Library of International Law (2012), https://perma.cc/47A5-BE8U (succinct expert commentary).

151. BHARAT H. DESAI, MULTILATERAL ENVIRONMENTAL AGREEMENTS: LEGAL STATUS OF THE SECRETARIATS 28–29 (2010).

152. Catherine Redgwell, *The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity*, HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 187, 191 n.18. (Donald N. Zillman, Alastair R. Lucas, George Pring eds., 2002).

> consists thus of the violation of an international rule. However, in certain hypotheses, States can bear responsibility for injurious consequences arising out of acts not prohibited by international law; this phenomenon is commonly called liability without fault, for risk or objective liability. Such regimes are well known in domestic law, but the international sphere remains almost unaffected by them. The works of the International Law Commission have not been conclusive on this point. There is no principle in international customary law on such an objective State liability, including for environmental damages. There is only one Convention that provides for such a regime of objective international liability, namely the Convention on International Liability for Damage Caused by Space Objects. To allow better reparation of environmental damages, around fifteen international conventions have developed regimes of objective liability but by shifting the responsibility on operators (managers and owners), thus drifting from public to private international law.[153]

In sum, the forms in which liability presents itself are: state liability only; civil liability with residual state liability; and civil liability only. The first can be further divided in three categories: subjective, objective (or strict), and absolute liability. The first category concerns acts performed by the State, of which the latter is intentionally responsible, and it stands as a corollary of international responsibility; the second refers to acts performed by the State unwillingly, e.g., by being negligent; the third proceeds so far as to cover acts not performed directly by the States and yet occurred resulting in damages vis-à-vis third parties, where it was not explicitly obvious the State should have exercised appreciable degrees of oversight.

However, there is no perfect alignment in academic literature on these sorting criteria. Admittedly, there are several scholarly traditions whose views on this issue diverge both conceptually and linguistically: liability is first a device of domestic (administrative and private) law, which is later "stretched" to acquire international applicability, and this enucleates the divergence between scholars on both substance and terminology. The just-mentioned three typologies of liability have been rephrased in literature, for example, as follows:

> fault (negligence), strict liability (there is a presumption of responsibility but defenses are available), and absolute liability (no cause of justification is possible, and a [S]tate would be liable even for an act of God). While fault is based on due diligence,

153. Maljean-Dubois, *supra* note 108, at 32–33.

> strict and absolute liability impose responsibility for acts not prohibited under international law. Strict liability emphasizes the harm rather than the conduct. It is a widespread opinion that international law lacks absolute or strict liability *as a general rule*. […] For example, strict liability for ultra-hazardous activities can be considered a general principle of law since it is found in municipal legislation worldwide. Some treaties even support absolute liability for these activities. However, strict or absolute liability is more difficult to impute for activities that are not ultrahazardous. [154]

One further way to interpret state liabilities is that none involves fault; as per this view, both strict and absolute liability are objective liabilities insofar as subjective ones are only arguable in international criminal law as far as individuals (heads of State, ministers, plus other public officials) are concerned. Under this interpretation, too, looking at environmental law is the wiser option to seek compensation for damages to cultural heritage, as domestic experiences like the Brazilian one started to demonstrate.[155]

Another issue is that, not rarely, "liable" and "responsible" are even used interchangeably,[156] whereas instead international liability and international responsibility are truly different concepts.[157] The latter is triggered by a state breach of a primary rule jointly with the attribution of such a breach; the second entails either a monetary redress following responsibility (absolute liability) or a payment *ex gratia* for non-wrongful yet attributed or attributable acts (strict liability). There exists a further distinction between direct and vicarious responsibility, which comes into play when private actors' violations are culpably not prevented by the State, which only bears relevance domestically. For example, with reference to the US, a study concluded that regarding

> the question of whether environmental liability should be deterred through a negligence *or* a strict liability rule, […] the policy maker should […] introduce strict liability for environmental pollution, [provided] that if a serious insolvency risk exists, the introduction of strict liability [is] accompanied with

154. Max Valverde Soto, *General Principles of International Environmental Law,* 3 ILSA J. INT'L & COMP. L. 193, 203 (1996) (emphasis added).

155. Ana Maria Moreira Marchesan, A Tutela Do Patrimônio Cultural Sob O Enfoque Do Direito Ambiental: Uma Abordagem Transdisciplinar 277–78 (2006) (unpublished LLM Thesis, Universidade Federal de Santa Catarina).

156. *E.g.,* Morten Broberg, *Interpreting the UNFCCC's provisions on "mitigation" and "adaptation" in light of the Paris Agreement's provision on "loss and damage,"* 20 CLIM. POL. 527, 529 (2020).

157. *See generally* N.L.J.T. Horbach, *The Confusion About State Responsibility and International Liability*, 4 LEIDEN J. INT'L. L. 47 (1991).

> solvency guarantees, such as the introduction of compulsory insurance. Otherwise, strict liability may exactly have the effect of driving polluters to reduce the assets that are exposed to liability.[158]

All in all, primary rules *at the international level* should always spell out clearly what the expectations are in terms of state duties to prevent, as well as the demarcation between obligations of conduct and of result, as to avoid confusion and unevenness of claims between international lawyers and practitioners from different jurisdictions. Terminological uncertainties go the extra mile also with regards to the classes of remedies[159] resulting from different unlawful or otherwise illicit behaviour.[160] At any rate, this article concerns itself with explaining why cultural heritage should be protected in combination with the environment, why state liability is a necessary device to uphold such protection, and why China is a central actor to watch in order to track and retrace the trends in this respect. A thorough systematisation of this confusion on questions of classes and theories in liability regimes falls outside the aspirations of the present study.

Claims of *state* liability can be submitted before national courts and tribunals, before international courts and tribunals,[161] or directly to relevant state officials for political resolution. These claims can be thus settled diplomatically (through mediation and negotiation) or judicially (through litigation and arbitration),[162] with mixed results in terms of normative impact on the future conduct of States. As for China, it "has more than sixty environmental chambers in fourteen courts in Provinces, for hearing

158. Michael Faure, *Effectiveness of Environmental Law: What Does the Evidence Tell Us?*, 36 WM. & MARY ENVTL. L. & POL'Y REV. 293, 303–304 (2012) (emphasis added).

159. For example: reparation, compensation, restoration, retribution, redress, recovery, injunctive relief, remedy, penalty, fine, indemnification.

160. For example: nuisance, damage, injury, destruction, harm, mistreatment, tort, fault, crime.

161. Nevertheless, potential criminal options (which would support e.g., evidence gathering) against top officials are not available, as the ICC non-parties are the very same top polluters (China and the US in the first place). On the (propounded, but apparently later aborted) "environmental turn" of the ICC, see Olesya Dovgalyuk & Riccardo Vecellio Segate, *From Russia and beyond: The ICC global standing, while countries' resignation is getting serious*, FiloDiritto, 18 (2017), https://perma.cc/J9EX-HDS3.

162. Refer e.g., to the 2001 PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources, under which individuals and other non-state entities may file a claim concerning other States' violation of environmental and natural resources. Still, this does not fill the gap about the *actio popularis* which could trigger proceedings regarding global (rather than transnational) environmental claims. Famous arbitration cases which shaped the course of international environmental law are *Trail Smelter* (United States v Canada), 3 U.N. Reports of International Arbitral Awards (1938 and 1941); and *Lac Lanoux* (France v Spain), 12 U.N. Reports of International Arbitral Awards (1957).

citizen complaints against polluters;"[163] pursuant to the Administrative Procedure Law of the People's Republic of China ("PRC"), the Chinese public administration can be sued, too,[164] which is a strong signal of authoritarianisation of state power rather than of its weakening.[165] Subject to an anything-but-obvious state consent, relying on domestic courts for the enforcement of state liability clauses (and transboundary environmental law more generally) bears one obvious advantage and one equally obvious disadvantage: the chance to ensure the bindingness of the judgements, and the risk of further fragmenting a fast-paced legal field which is already moving in uncoordinated directions.[166]

Furthermore, a distinction shall be operated between issues of climate change and transboundary pollution. Assuming the existence of States A to G, four typologies of cases are foreseeable: transboundary (damage to e.g., A *and* B, with A or B starting it by damaging themselves first), international unilateral (damage e.g., *from* A *to* B), international bilateral (mutual damage between A and B *and* vice versa), international multilateral (damage e.g., from A to BCDE or from ABC to DEFG or from ABCDE to G etc.—some multilateral configurations can actually be read as bilateral instead, for instance when the European Union as a whole is involved), or global (when all States—or most of them—threaten a "commons" in a supranational fashion that makes it unfeasible or blatantly unfair to apportion faults). In each of these cases, the parties have to identify the (most) competent forum, the source of the applicable liability rules,[167] and the remedies available thereunder.

163. Nicholas A. Robinson, *Evolved norms: A canon for the Anthropocene*, RULE OF LAW FOR NATURE: NEW DIMENSIONS AND IDEAS IN ENVIRONMENTAL LAW 46, 70 (Christina Voigt, ed. 2013); *see also* Minchum Zhang and Bao Zhang, *Specialized Environmental Courts in China: Status Quo, Challenges and Responses*, 30 J. ENERGY & NAT. RESOURCES L. 361 (2012); Rachel E. Stern, *The Political Logic of China's New Environmental Courts*, 72 THE CHINA J. 53 (2014).

164. Taisu Zhang & Thomas B. Ginsburg, *China's Turn Toward Law*, 59 VA. J. INT'L L., 280, 310 n.144 (2019).

165. RACHEL E. STERN, ENVIRONMENTAL LITIGATION IN CHINA: A STUDY IN POLITICAL AMBIVALENCE, 100–104 (2013).

166. TIM STEPHENS, *INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION*, 78–80 (2009).

167. General principles of transboundary liability in environmental matters; customary laws; treaties, possibly supplemented by and "operated" through soft norms; domestic civil law (of which side?); domestic criminal law (of which side?).

III.2 Liability schemes and environmental principles

Whatever the forum and framework for submission, the elements of liability which are often argued about in terms of environmental damage[168] (especially to cultural heritage) are linked to a variety of principles, standards, and customary expectations. Some of the most cited are the polluter-pays principle, the "solidarity" principle, the right to a clean and healthy environment (quality living), the no-harm principle (substantially equivalent to the *sic utere tuo ut alienum non laedas* one), and the "intergenerational equity" principle within the paradigms of sustainability.[169] Whereas some of these principles, functionally employed as interstitial norms,[170] may play a clearer role in shaping judicial responses to transboundary harm, their applicability to climate-change submissions is still controversial in both civil- and common-law systems.[171]

The "common but differentiated responsibility" principle[172] holds a position of prominence for discussions over liability regimes in areas beyond national jurisdiction(s) or with reference to the global commons,[173] for instance regarding climate change:

> The proposition that large emitters in the developing world (such as China, India and Brazil) should accept mandatory emission reduction targets has revitalized questions of North-South equity and the industrialized countries' historical responsibility for the build-up of atmospheric GHG concentrations. [. . .] Proposals for more systematic differentiation on the basis of historic responsibility for elevated atmospheric GHG concentrations, financial capability to pay for mitigation measures, intra-national equity among rich and poor

168.*See* TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, 50–64 (Lal Kurukulasuriya & Nicholas A. Robinson eds., 2006) (general introduction to state liability schemes in IEL).

169. Their most thorough examination is probably accomplished in PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (4th ed. 2018).

170. On environmental principles as interstitial norms, see, most recently, Guillaume Futhazar, *The Normative Nature of the Ecosystem Approach: A Mediterranean Case Study*, TRANSNAT'L ENVTL L. 11–13 (2020).

171. *See generally* Daniel G. Hare, *Blue Jeans, Chewing Gum and Climate Change Litigation: American Exports to Europe*, 29 UTRECHT J. INT. EUR. LAW 65 (2013).

172. *See* HARRIET BULKELEY AND PETER NEWELL, GOVERNING CLIMATE CHANGE 30 (2010).

173. The discourse on the "commons" is channelled through uneven narratives, depending on the subject-matters (i.e., the "commons" among cultural heritage expressions, those among natural environments, etc.).

> social groups, and differentiation between luxury and survival emissions have therefore surfaced in the debate.[174]

Whilst the Kyoto approach to this principle distinguished the responsibilities of the industrialised nations from "the rest,"[175] the Paris Agreement "took a decisive turn away from cross-cutting prescriptive differentiation towards tailored differentiation," with different issue-areas reflecting disparate differentiation criteria (financial capability, developmental classification, contribution to emissions) as a result of impervious bargaining between the US and China.[176]

Another core principle is the precautionary one, references thereto having been invariably made

> (i) to caution against the principle's "potentially paralysing effects;" (ii) to assess whether certain measures expressly adopted on the basis of the precautionary principle are indeed justified under this principle; (iii) as a stand-alone norm relevant to produce procedural effects (the reversal of the burden of proof); (iv) as a stand-alone norm relevant to for the interpretation of an environmental provision governing a case; (v) as a stand-alone norm for reviewing of government action; (vi) as a stand-alone norm creating a positive procedural obligation; (vii) as a stand-alone norm *redefining the parameters of liability* (effectively transforming a fault-based liability system into a strict liability one); and (viii) as a stand-alone norm requiring the creation of a new administrative system.[177]

Other Authors in fact claim that the difference between the precautionary principle and the polluter-pays one is that the first is procedural and the second substantive, concerned with burden of proof and apportionment of costs respectively, although both oriented to the

174. Karin Bäckstrand & Eva Lövbrand, *Climate Governance Beyond 2012: Competing Discourses of Green Governmentality, Ecological Modernization and Civic Environmentalism*, THE SOCIAL CONSTRUCTION OF CLIMATE CHANGE: POWER, KNOWLEDGE, NORMS, DISCOURSES 123, 137 (Mary E. Pettenger ed., 2007).

175. Kiyotake Morita, *Policies Towards Tackling Climate Change and Their Compatibility with the WTO*, CONTEMPORARY ISSUES IN ENVIRONMENTAL LAW: THE EU AND JAPAN 63, 78 (Yumiko Nakanishi ed., 2016); Anne-Sophie Tabau, *Climate Change Compliance Procedures*, MAX PLANCK ENCYCLOPAEDIA OF INTERNATIONAL PROCEDURAL LAW [MPEiPro] § 6 (2019).

176. Lavanya Rajamani, *Differentiation*, A GLOBAL PACT FOR THE ENVIRONMENT: LEGAL FOUNDATIONS 167, 170–173 (Aguila, Yann, and Jorge Enrique Viñuales eds., 2019).

177. Aguila, *supra* note 144, at 18–19 (emphasis added); *see also* Robyn Eckersley, Environment *rights and democracy*, POLITICAL ECOLOGY: GLOBAL AND LOCAL 347, 362 (Roger H. Keil et al. eds., 1998).

internalisation of environmental costs in industrial production and commercial choices made by consumers (especially in the Global North).[178]

Finally, the debate is open as to whether customary obligations to prevent exist, either under inter-state rules or with regards to the global commons. One should notice that redressable environmental harms might be constituted by single acts of pollution or by multiple yet localised acts of degradation (slow-onset harm); either way, they shall be underpinned by certainty of relatability (causation). Conversely, probability (correlation) is what describes the negative effects of climate change as a general phenomenon in the more abstract and gradual sense. Depending on the field, the signatories, and the region (when such arrangements are regional), liability schemes may prescribe a range of duties.[179]

III.3 Liability schemes in the legal governance of the environment

Article 8 of the [Paris] Agreement does not involve or provide a basis for any liability or compensation.[180]

Focusing on perfecting and diversifying liability arrangements displaces a large part of the inadequacy that the concept of "responsibility" faces in improving the global governance of the environment.[181] Some Authors posit that out of countless quasi-principles permeating IEL, that of

178. BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE: ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 191 (2013). However, the ICJ did not endorse the equation of this principle with a reversal of the burden. *See* Ginevra Le Molli et al., *Whither the Proof? The Progressive Reversal of the Burden of Proof in Environmental Cases before International Courts and Tribunals*, 8 J.I.D.S. 644 (2017).

179. Just to exemplify, provided the proven concretisation of an actual damage, liability may be incurred into for the unfulfillment of different sets of actions, ranging from cooperation in scientific research, prior notice, stakeholders consultation, information exchange, reporting, impact assessment, administrative oversight, relevant legislation etc. to the duties of preventing, compliance monitoring, recording, containing, performing (or at least funding) cleaning-up activities, assisting in the re-adaptation and elaboration of copying strategies, etc., or again, even *ex post*, for failing to investigate and thus to "lesson learn." Several jurisdictions demand the execution of environmental and archaeological feasibility studies and expert evaluations at the same time, grounded on the precautionary principle; a few countries also show an approach to international investment law warranting the inclusion in their BITs of a clause calling for special care when it comes to investments potentially impacting sites of tangible or intangible cultural significance (*see, e.g.*, Art.200(3) of the 2008 China-New Zealand Free Trade Agreement). Preventive actions on long-term pollution (low intensity) or the drawing of contingency plans for possibly impending disasters (high intensity) may be required, along with the establishment of financial compensatory plans at the governmental level, whilst leaving States to deal with their own private entities subsequently (burden shifting).

180. Adoption of the Paris Agreement, Decision 1/CP.21, UN Doc FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), at ¶ 52.

181. *See generally* Rajendra Ramlogan, *The Environment and International Law: Rethinking the Traditional Approach*, 3 VT. J. ENVTL. L. 1 (2001).

liability for damage is an unconfutable one, endowed with the status of customary law;[182] consequently, it seems a solid terrain to assess the "state of the art" in environmental protection in a given country, as well as the way the environmental protection implemented by said country might positively spill-over onto another legal protection: that to cultural heritage. The Stockholm Declaration encouraged States to formulate their own liability rules for transboundary damage,[183] yet

> [r]elevant issues not addressed include the type and degree of environmental harm to be prevented, the procedural obligations (such as notification, consultation, and cooperation) that are necessary to ensure that harm does not occur or is minimised, and whether the obligation of prevention is one of strict liability or due diligence, and the relevant remedies applicable in the event of any breach.[184]

Conversely, UN-sponsored Guidelines for the development of national legislation on liability, response action and compensation for damage caused by activities dangerous to the environment[185]—adopted by UNEP's Governing Council at its 11th Special Session in Bali together with its Guidelines for the development of national legislation on access to information, public participation and access to justice in environmental matters—are so detailed that, although non-binding like the Stockholm Declaration, leave far less leeway to States not only in legislating on the matter, but in deciding how such legislation should be worded and what exceptions it should provide for. On top of that, fundamental scholarly views include the Resolution "Responsibility and Liability under International Law for Environmental Damage" released by the Institute of International Law in 1997, the Principles on Climate Change and Climate Liability Under Public International Law developed by the International Law Association in 2014 and, most authoritatively, the 2001 Draft of Prevention of Transboundary Harm from Hazardous Activities adopted by the International Law Commission ("ILC").[186] The same ILC, in its Draft

182. *E.g.*, Winfried Lang, *UN Principles and International Environmental Law*, 3 MAX PLANCK YRBK. U. N. L. 157, 165–166 (1999).

183. *See* Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment*, UN Doc.A/CONF.48/14, at principles 21–22 (1972).

184. STEPHENS, *supra* note 166, at 153.

185. UNEP/GCSS.XI/L.5 (2010).

186. Draft Articles on Prevention of Transboundary Harm from Hazardous Activities in Report of the International Law Commission, *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10* (A/56/10). *See e.g.*, Arts. 3, 8 and related Commentaries (e.g., Commentary 10 to Art. 3, on due diligence). Those two articles build on Principles 13, 18 of the 1992 Rio Declaration on Environment and Development.

Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities (2006 second reading), has included cultural heritage in the scope of property[187] (even if the Draft's scope deliberately excluded economic and financial harms related to environmental ones in the aftermath of transboundary pollution[188]). Somewhat similarly, even the 1991 Protocol on Environmental Protection to the Antarctic Treaty—also called "Antarctic-Environmental Protocol," or "Madrid Protocol"—mentioned the "degradation of, or substantial risk to, areas of biological, scientific, *historic, aesthetic* or wilderness significance"[189] before calling for the specification of liabilities for damage.[190] The 1988 Convention on the Regulation of Antarctic Mineral Resource Activities ("CRAMRA") had only referred to the obligation of *taking into account* "the preservation of historic monuments"[191] before deciding on new Antarctic mineral resource expeditions.

Further significant efforts have been deployed by regional UN bodies; for instance, the UNECE Industrial Accidents Convention, already mentioned *supra*,

> is part of a pan-European legal framework to protect our environment and encourage sustainable development that has been negotiated by governments within the UN/ECE in response to regional challenges. Apart from this Convention, the framework also consists of four other multilateral agreements: Convention on Long-range Transboundary Air Pollution and its

187. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities in Report of the International Law Commission, *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10). Principle 2(a)(ii); *see also* Principles 4, 7.

188. *See* HANQIN XUE, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW 5 (1st ed. 2003). Whilst the Author was later elected as a Member of the International Law Commission and as a Judge and Vice-President of the International Court of Justice, this monograph is an expanded version of her SJD Thesis at Columbia University Law School under the supervision of Professor Oscar Schachter, thus its contents might not perfectly align with her later official views on these dossiers. Moreover, the fact that at the time of publication she was already serving as the Director-General of the Law and Treaty Department of the PRC Ministry of Foreign Affairs helps explain the virtual absence of references to Chinese law and its international implications, which is truly unfortunate and quite a severe gap in her study.

189. Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455, 1462. Art. 3(2)(b)(vi) (emphasis added).

190. Annex VI on Liability Arising from Environmental Emergencies to the Protocol on Environmental Protection to the Antarctic Treaty art. 16 (June 14, 2005).

191. Convention on the Regulation of Antarctic Mineral Resource Activities art. XV (1), June 2, 1988.

> eight Protocols;[192] Convention on the Protection and Use of Transboundary Watercourses and International Lakes and its Protocol on Water and Health; Convention on Environmental Impact Assessment in a Transboundary Context; and Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[193]

As for the Inter-American System, the Inter-American Court of Human Rights' Advisory Opinion on Environment and Human Rights, released on 7 February 2018, is the reference authority on *transboundary* environmental damage.[194] Given that similar human rights arrangements do not feature in the Asian regionalism and international human rights law is factually unserviceable in Chinese courts, no comparable judgement bears any relevance for China. The non-binding 2007 Singapore Declaration on Climate Change, Energy and the Environment adopted by ASEAN members along with Australia, *China*, India, Japan, South Korea and New Zealand limits itself to formulaic expressions with no mention of either cultural heritage or liabilities, whilst confirming in passing "support for UNFCCC work [. . .] including through appropriate international *incentives and assistance*."[195]

As for international judicial pronouncements, pre-eminence shall be accorded to notable International Court of Justice ("ICJ") case-law[196] which, having been already explored in-depth in legal scholarship, will not be examined in detail here.

192. UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE ("UNECE"), CONVENTION ON THE TRANSBOUNDARY EFFECTS OF INDUSTRIAL ACCIDENTS (2015). *See* "Considering . . . " in the Preamble.

193. From its description on UNECE's official website, at https://perma.cc/FWX9-5UAR. [footnotes added]

194. Out of a vast literature on this much-awaited IACtHR Opinion, see Monica Feria-Tinta & Simon C. Milnes, *The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*, 27 Y.B. OF INT'L ENVTL L. 64 (2016); Giovanny Vega-Barbosa & Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: TALK! (Feb. 26, 2018), https://perma.cc/SYW8-GQ84.

195. Singapore Declaration on Climate Change, Energy and the Environment, Nov. 21, 2007, art. 9(d) (emphasis added).

196. *See, e.g.,* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 241; Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. People's Republic of Albania, Judgment, 1940 I.C.J. 4 (Apr. 9, 1949)); Gabcikovo-Nagymaros Project (Hungry v. Slovakia), 1997 I.C.J. 38 (Sept. 25, 1997) (Weeramantry, J.); Pulp Mills on the River Uruguay (Argentina v. Uruguay), 2010 I.C.J. ¶ 122 (Apr. 20, 2010) (Cançado Trindade, J.); Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), 2014 I.C.J. ¶ 47 (Feb. 6, 2014) (Cançado Trindade, J.).

On another note, *private* liability schemes are widespread.[197] The 1999 Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal does not mention damage to cultural property/heritage, consistently with all others which focus on the *natural* consequences of environmental hazards. Among them, we shall mention at least the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1969 International Convention on Civil Liability for Oil Pollution Damage, the 1992 Protocol which created the 1992 Civil Liability Convention, the 1971 International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, the 2000 Protocol leading to the FUND Convention, the 1993 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, and the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety. In civil liability schemes concerning the environment, strict liability is the norm, and absolute liability its exception.[198] Most are yet to enter into force, and it is far from clear whether they establish any individual civil liability *directly under international law*, instead of the more "classical" state liability for failing to enforce liability schemes bearing on non-state actors within signatories' domestic jurisdiction.[199]

In the ship-owning market, under the CLC/FUND, HNSC, and Bunkers Convention regimes, a strict liability model in which compensation claims are shifted against the insurer benefitted both the victims (certainty of redress) and the polluters (no delays due to arrest and inspection by coastal States, and no litigation on faults as cases can be settled amicably).[200]

IV. Why is China important?

> [T]o the extent that China has thrived, it has been by defying many elements of the neo-liberal model. Leave out China, and the

197. For a concise commented overview, see Andrea Laura Mackielo, *Core Rules of International Environmental Law*, 16 ILSA J. of INT'L and COMP. L. 259, 271–73 (2009).

198. Philippe Cullet, *Liability and redress for human-induced global warming: Towards an international regime*, 43 STAN. J. of INT'L L. 99, 111–12 (2007).

199. Vincent-Joël Proulx, *International Civil Individual Responsibility and the Security Council: Building the Foundations of a General Regime*, 40 MICH. J. of INT'L L. 215, 230–31 (2019).

200. ALAN KHEE-JIN TAN, VESSEL-SOURCE MARINE POLLUTION: THE LAW AND POLITICS OF INTERNATIONAL REGULATION 342–43 (2005).

> story of the rest of the world is sluggish growth in the North, erratic growth in the South and rising inequality everywhere.[201]

IV.1 Seeking coherence and prospect in China's "exceptionalism"

Since July 2019, at pair with Italy, China registers the highest number (fifty-five) of UNESCO-protected sites inscribed in the World Heritage List, and due to China's size (and civilisational history), not to mention its unyielding "soft"-power within UNESCO,[202] it is going to outpace the Italian "competitor" soon. Some of the most well-preserved sites globe-wide combining nature with heritage are in China;[203] for instance, the founding director of the United Nations University Institute for Integrated Management of Material Fluxes and of Resources cites the case of Hángzhōu [杭州], in the Zhèjiāng province [浙江省], hosting the "West Lake Cultural Landscape [. . . ,] where natural elements, farmed landscape and artificial elements manifest *a perfect fusion*."[204] Populations' relationship with natural and cultural heritage in rural areas represents a story of fragile yet almost uninterrupted symbiosis: almost 78% of China's protected areas are located in the country's western provinces of Xīzàng, Xīnjiāng, and Sìchuān,[205] way poorer compared to the sparkling of those coastal cities (like Shànghǎi) China is most known for today beyond its borders.

201. KEVIN P. GALLAGHER and RICHARD KOZUL-WRIGHT, A NEW MULTILATERALISM: GENEVA PRINCIPLES FOR A GLOBAL GREEN NEW DEAL FOR SHARED PROSPERITY 19 (Global Development Policy Center, 2019).

202. *See* Enrico Bertacchini, Claudia Liuzza & Lynn Meskell, *Shifting the balance of power in the UNESCO World Heritage Committee: An empirical assessment*, 23(3) INT'L J. OF CULTURAL POL'Y 331, 334, 345 (2017).

203. This article focuses on the so-called "Mainland China," which coincides with the internationally recognized territory of the People's Republic of China except for its two Special Administrative Regions of Hong Kong ("HKSAR") and Macao ("MSAR"). This notwithstanding, HKSAR and MSAR, together with a number of cities surrounding the Pearl River Delta in the Mainland's Guangdong Province, represent an increasingly cardinal economic powerhouse known as the Greater Bay Area ("GBA"), which comes to be of outstanding preciousness (and precarity) artistically and environmentally as well. The linkage between cultural heritage and the environment in the GBA is illustrated in Rostam Josef Neuwirth & Zhijie Chen, *The Guangdong–Hong Kong–Macao Greater Bay Area: Cultural Heritage Laws as a Bridge between Past and Future*, 50(2) HONG KONG L.J. 743–779 (2020) (*see* particularly p. 765, about Annex 10 to the Technical Memoranda on Hong Kong's Environmental Impact Assessment Process).

204. *Retrievable from* Reza Ardakanian & Stephan Hülsmann, *Impact of Global Change on World Heritage and on Environmental Resources: The Need for an Integrated Management Approach*, CLIMATE CHANGE AS A THREAT TO PEACE: IMPACTS ON CULTURAL HERITAGE AND CULTURAL DIVERSITY 101, 103 (Sabine von Schorlemer & Sylvia Maus eds., 2014) (emphasis added).

205. Miao He & An Cliquet, *Sustainable development through a rights-based approach to conserve protected areas in China*, 3 CHINA-EU L.J. 143, 144 (2014).

Beginning with the First Opium War in the 1840s through the WW2, Europeans contributed to a barbarian negation of China's civilised and civilisational roots by destroying or looting most of its heritage, in what is known as the "Century of Humiliation" (*Bǎinián Guóchǐ*, 百年国耻).[206] Today, China prides itself on its millennia-long civilisation, yet it has never been able or willing to comprehensively adopt a management plan for its cultural heritage as to preserve what remains of its vestiges to the benefit of the upcoming generations.[207] To the contrary, few movements in human history have attacked *their own* cultural heritage—both tangible and intangible, movable and immovable—as mercilessly as the fanatics of the Cultural Revolution—Chinese themselves—did: "the Cultural Revolutionary campaign of "destroying the Four Olds" (*pòsìjiù*, 破四旧) meant attacking old ideas, old habits, old customs, and old culture."[208] The exaltation of human labour entailed no machines (differently from the Soviets), crude rejection of intellectuals, no lawyers, people-to-people diplomacy, in an "it's all about mobilising labour"-fashion; the fact that this triggered widespread destruction of cultural heritage speaks volumes about the latter's ideal identification as a product of the intellect rather than of manual labour, otherwise, it would have perhaps been saved. Nonetheless, when judged from an environmental prism, the country did come a long way from the barbarism of the "Cultural" Revolution to reasonably genuine environmental commitments bearing indirect but positive effects on cultural heritage protection. As such, China testifies to the importance of this linkage at its best. For example, under the 2007-revised Cultural Relics Protection Law [*guójiā wénwù bǎohùfǎ*, 国家文物保护法], Chinese "[e]nvironmental agencies may punish violations […] involving pollution levels at protected sites,"[209] although enforcement efforts still languish. China's environmental law, extremely advanced and rich on paper—

206. *See* ERIK RINGMAR, LIBERAL BARBARISM: THE EUROPEAN DESTRUCTION OF THE PALACE OF THE EMPEROR OF CHINA (2013); DAVID SCOTT, CHINA AND THE INTERNATIONAL SYSTEM, 1840–1949: POWER, PRESENCE, AND PERCEPTIONS IN A CENTURY OF HUMILIATION, 41, 260 (2008); HUI ZHONG, CHINA, CULTURAL HERITAGE, AND INTERNATIONAL LAW, 2–3 (2018).

207. Yunxia Wang, *Enforcing Import Restrictions of China's Cultural Objects: The Sino-US Memorandum of Understanding*, ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 240, 241 (Tami Blumenfield and Helaine Silverman eds., 2013).

208. Curtis Ashton, *Beijing's Museums in the Context of the 2008 Beijing Olympics*, CULTURAL HERITAGE POLITICS IN CHINA 187, 190 n.1 (Tami Blumenfield & Helaine Silverman eds., 2013).

209. Phillip Newell, *The PRC's Law for the Protection of Cultural Relics*, 13 ART ANTIQUITY & L. 1, 53 (2008). This was confirmed in art. 67 of the 2017 revision, according to which Chinese environmental agencies may punish violations involving polluting facilities at protected sites.

starting with Article 26 of the 1982 Constitution—is in fact infamous for the incompliance thereof, especially in the most decentralised provinces.[210]

Environment-wise, "China's participation in international environmental conferences and conventions on biodiversity preservation followed upon [its] opening up to global forces after the Maoist era, and expressed the increased value [it] placed in the UN and international law."[211] At present, China shows the contradiction of representing the world's largest emitter of greenhouse gases and a firmly committed environmentalist power at once, with new renewable-energy projects realised every day (including the production of electric cars) and local draft regulations on mandatory emission trading systems. "[A]ny success of reduction in those developed [S]tates having fulfilled their obligations in respect to reduction to climate change (like [in] the EU), are more than compensated simply by the increase of emissions of fast developing countries. China is meanwhile the world's biggest emitter; [however, this] may be explained by the large population" rather than dismissal of genuine environmental public-policy concerns,[212] as China scores low per-capita emission levels. If a couple of decades ago only foreign firms operating in China possessed the technology needed to build coal-efficient power plants, yet this economic-ecological gain was frequently annulled by high transaction costs due to difficulties in copying with unfriendly governmental bureaucratic procedures,[213] today Chinese firms own similar and more advance technologies that can lead environmental progress *from within* (and even export it regionally). As for the emission trading systems, China does not host an international one[214]—which would be a worthwhile policy action to pursue, since "the problem of sharing the burden equitably

210. *See generally* Wanxin Li [李万新], *Environmental Governance: Issues and Challenges*, 36 ENVTL L. REP. 10506, 10515–10525 (2006).

211. GERALD A. MCBEATH & LENG TSE-KANG, GOVERNANCE OF BIODIVERSITY CONSERVATION IN CHINA AND TAIWAN 75 (2006). As for biodiversity specifically, China is a party to the Convention on Biological Diversity (5 June 1992; 1760 U.N.T.S. 69) and will host the Fifteenth Meeting of the Conference of the Parties to said Convention in Kunming from 17–30 May 2021. By contrast, it has (temporarily?) not undersigned the Leaders' Pledge for Nature (text available at https://perma.cc/K7J9-PXSR) developed by the Alliance of Small Island States to reverse biodiversity loss by 2030. *See* Lisa M. Cox, *Australia joins US, China and Russia in refusing to sign leaders' pledge on biodiversity*, GUARDIAN (2020), https://perma.cc/T83W-E86P.

212. Simon Spyra & Eike Albrecht, *Beside Adaptation: Concepts for the Future*, IMPLEMENTING ADAPTATION STRATEGIES BY LEGAL, ECONOMIC AND PLANNING INSTRUMENTS ON CLIMATE CHANGE 329, 334–37 (Eike Albrecht et al. eds., 2014).

213. Thomas Charles Heller, *Additionality, Transactional Barriers and the Political Economy of Climate Change*, INTERNATIONAL ENVIRONMENTAL AGREEMENTS ON CLIMATE CHANGE 203, 219–220 (Carlo Carraro ed., 1999).

214. VEERLE VANDEWEERD, CITIES AND LOW-CARBON DEVELOPMENT IN CHINA 36–7 (China Council for International Cooperation on Environment and Development, 2014).

is significantly less difficult *if emission rights are tradeable*"[215]—but recently implemented a nationwide system,[216] which have attracted curiosity and political praise[217] but also informed criticisms and scepticism from the scientific community.[218] However, the general attitude of the Chinese government stands out of the general wisdom that "scientific evidence tends to be deconstructed to the extent that it threatens powerful political and economic interests," even more remarkably insofar as "authoritarian regimes as a whole tend to sacrifice the environment in favor of other concerns."[219] Obviously, in any case, a country cannot be measured against its commitments but against its actions, which means that if the latter do not suffice, the legal framework should accompany—and possibly compel—higher effectiveness accordingly.

China's fierce battle against ozone depletion is exemplificatory in that it shows that despite implementation difficulties, Beijing honoured its commitments under the 1987 Montreal Protocol,[220] motivated by appraisals on international reputation but also encouraged by a Multilateral Fund established by developed countries.[221] In this case, the Fund follows a different rationale compared to similar economic arrangements in environmental treaties: its money is provided by the industrialised nations through expert organisations (UNEP, UNDP, World Bank, regional

215. Glenn W. Harrison & Thomas F. Rutherford, *Burden Sharing, Joint Implementation, and Carbon Coalitions*, INTERNATIONAL ENVIRONMENTAL AGREEMENTS ON CLIMATE CHANGE 77, 77 (Carlo Carraro ed., 1999).

216. Covering "eight energy-intensive sectors, namely petrochemical, chemical, building materials, iron and steel, non-ferrous metal, papermaking, power generation and aviation industries, [t]he national ETS targets more than 7,000 industrial companies and aircraft operators whose annual energy consumption is more than 10,000 tons of standard coal in any year during 2013-2015 [. . .]. It covers about 5 billion tons of CO2 or half of national overall emissions, leading China to become the biggest carbon market in the world." ZHEN JIN & ERI IKEDA, THE LATEST PROGRESS OF EMISSIONS TRADING SCHEMES IN JAPAN, CHINA AND THE REPUBLIC OF KOREA 7 (Institute for Global Environmental Strategies, 2017), https://perma.cc/X4TK-CSKE.

217. *See*, *e.g.*, the proposals advanced in Melinda Melvin, *China's Emissions Trading System: Steps toward article 6 linkage*, 31 DUKE ENVTL. L. & POL'Y F., 197, 197–223 (2019).

218. On the most recent developments *see* Jennifer Morris et al*., Impacts of China's emissions trading schemes on deployment of power generation with carbon capture and storage*, 81 ENERGY ECON., 848 (2019); Mao-Zhi Deng & Wen-Xiu Zhang, *Recognition and analysis of potential risks in China's carbon emission trading markets*, 10 ADVANCES IN CLIMATE CHANGE RES. 30 (2019).

219. Myanna Lahsen, *Trust Through Participation? Problems of Knowledge in Climate Decision Making*, THE SOCIAL CONSTRUCTION OF CLIMATE CHANGE: POWER, KNOWLEDGE, NORMS, DISCOURSES 173, 186 (Mary E. Pettenger ed., 2007).

220. Jimin Zhao & Leonard Ortolano, *The Chinese Government's Role in Implementing Multilateral Environmental Agreements: The Case of the Montreal Protocol*, 175 CHINA Q. 708, 710 (2003).

221. *Id.* at 714–15.

banks)[222] and allocated to the developing ones for the latter to reach the desired and previously agreed targets;[223] as such, it does not serve the more common function of "compensating" third countries or the "international community" in the event of incidents or incompliance. "There seems to be an evident need to coordinate the Ozone Regime with the Climate Change Regime, since some of the substitute substances to ozone-depleting gases are classified as greenhouse gases under the 1997 Kyoto Protocol to the […] UNFCCC."[224] As China is set to organise around a few megalopolis[225] and its GDP has quintupled between 2000 and 2020, it shall remain seized on the matter in order to avoid pollution-congestion phenomena.

IV.2 "Keeping face" amid internationalism and transnationalism

At present, environmentally, China defines itself as a "*responsible* developing country"[226] that intends to protect the environment also beyond its borders, as a necessary component of its model of "shared future" (or "common destiny") for mankind [人类命运共同体].[227] If we assume as true that "climate change can be seen as a potentially unique opportunity to develop more rational and egalitarian international governance structures and normative reforms not at variance with the principle of 'sustainable development'," [228] the relevant questions are whether China: 1) looks forward to a more egalitarian legal governance or tends to adapt to existing schemes by aspiring to replacing its current game-holders;[229] 2) deems

222. Charlotte M.J. Streck, *Financial instruments and cooperation in implementing international agreements for the global environment*, MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 493, 498 (Gerd Winter ed., 2006).

223. Donald L. Goldberg (U.N. Ambassador) et al., *Effectiveness of trade and positive measures in multilateral environmental agreements: Lessons from the Montreal Protocol*, 103 UNEP (1997) (Background paper prepared by the Center for International Environmental Law for the United Nations Environment Programme).

224. NICHOLAS A. ROBINSON & LAL KURUKULASURIYA, UNEP TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW 106 (2006).

225. Min Shao et al., *City Clusters in China: Air and Surface Water Pollution*, 4 FRONTIERS IN ECOLOGY & THE ENV'T 353, 353-61 (2006).

226. Second National Communication on Climate Change of The People's Republic of China 14, 101 (2012).

227. Liza Tobin, *Xi's Vision for Transforming Global Governance: A Strategic Challenge for Washington and Its Allies*, 2 TEX. NAT'L SECURITY R. 154, 164 (2018).

228. Chechi, *supra* note 113, at 193.

229. In fact, it has been postulated that "if we think of China in terms of exceptionalism we are incapable of understanding the current international legal order;" *see* Maria Adele Carrai, *Global Constitutionalism and the Challenge of China's Exceptionalism*, GLOBAL CONSTITUTIONALISM WITHOUT GLOBAL DEMOCRACY (?), EUROPEAN UNIVERSITY INSTITUTE WORKING PAPERS 21, 108 (Claudio Corradetti & Giovanni Sartor eds., 2016), https://perma.cc/5SXX-T5AU.

development to be subjected to its "sustainable" qualification; 3) reputes climate change a sufficiently strong leverage to enhance its forthcoming role as "responsible *superpower*" in the community of nations; and 4) will keep its promises and resolutions, when tested against reality in the short as well as long run, including potential slowdown in its annual GDP growth. One may wonder, by way of exemplification, whether China's authoritarian environmentalism is capable of securing the outcomes it strives for, when tested against more democratic modes of environmental governance.[230] In other words, the dilemma does not only concern how China behaves today—when, borrowing from comparative economic-history literature, it might be said to benefit from the "advantage of backwardness,"[231] but how it *would* act *in forwardness* if/when acquiring superpower responsibilities; no one can predict the future, yet some insights can be inferred by retracing China's behaviour in recent history. Beijing's rebuttal of decentralisation in such a vast and populated country learns from a past regulatory chaos made of "fragmented authority and problems of accountability,"[232] but it is not limited to that: China's authoritarianism in environmental policymaking envisions an interpretation of the Executive's role domestically, yet also of China in international affairs towards the edification of an allegedly "new" world order. While Chinese leaders keep tightening their grip domestically, the foundation of the world order they

230. *See* Bruce Gilley, *Authoritarian environmentalism and China's response to climate change*, 21 ENVTL. POL. 287, 287–307 (2012).

231. *See, e.g.*, Alexander Gerschenkron, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE: A BOOK OF ESSAYS 5–30 (1962). In broad political terms, this advantage translates in the chance for China to pledge industrial commitments and deploy rhetorical artifices that would possibly be untenable or no longer strategically convenient if it were a superpower like the US is today. Economically, instead, backwardness implies that China could "adopt production methods with lower emission and/or resource intensity that were developed by industrialized nations; implement environmental policies based on scientific knowledge on environmental pollution and damage; and promote industrial sites leading to low emission intensity in the early stages of economic development[, thus dodging] the serious environmental deterioration and pollution industrialized nations have experienced and 'tunnel[ling] through.'" *See* Akihisa Mori, *Sustainable development and environmental governance, in East Asia*, ENVIRONMENTAL GOVERNANCE FOR SUSTAINABLE DEVELOPMENT: EAST ASIAN PERSPECTIVES 4 (2013). *See also* Justin Yifu Lin [林毅夫], *China's growth miracle in the context of Asian transformation,* WIDER Working Paper No. 92 5 n.5 (2018). Economics literature suggests that despite the advantage-of-backwardness manifesto, "less developed nations need to make a number of foundational investments in their own technological capabilities in order to subsequently be able to adopt the green technologies developed in the 'North' and adapt them to their particular settings. Whether investments in green innovation in the 'North' will strengthen the incentives of less developed nations sufficiently to lead them to invest in the required absorptive capacity is an open empirical question." *See* Philippe Mario Aghion & Xavier Jaravel, *Knowledge Spillovers, Innovation and Growth*, 125(583) THE ECON. J. 533, 538 (2015).

232. Michael G. Faure et al., *Bucking the Kuznets curve: Designing effective environmental regulation in developing countries*, 51 VA. J. OF INT'L L. 65, 122 (2010).

strive to pursue and ultimately champion rests on an anti-imperialistic, *democratic* system of global governance. Although the self-restrained accomplishment of this plan is far from granted, *on the conceptual plane* it does not stand in contradiction to the Party's autocratic rule: "democracy" as intended by Beijing is that *between* States in the international relations of a multipolar, no-longer-American world, and not that *within* States (although one might obviously wonder whether the former, as a cornerstone of Westphalian international law, is truly meaningful—of even long-term feasible—in the absence of domestic accountability mechanisms for internationally negotiated and implemented policies).

The fear of "losing face" being paramount in China, one overall forecast could be that the Chinese would prefer to contribute their share to a common international fund whilst adhering to the "classical" state responsibility *in general*, rather than being held liable *in particular* transboundary cases and settle those cases "at pair with" individual claimants from third countries. Apart from China that would contribute *internationally* whilst keeping its face *transnationally*, usually States settle these cases bilaterally or multi-bilaterally[233] by facing their specific liability on a case-by-case basis, as they find this last solution more convenient both money- and time-wise. The 2005 Songhua River incident between China and Russia,[234] involving petrochemical plants and originated between the two northernmost Chinese industrial cities of Jilin and Harbin, is to be recalled in passing as a "case-study within the case-study;" this is illustrative because of the close geopolitical ties between the two States, in that politics in this field cannot be easily dismissed or discerned from the law. Not secondarily,

> while the possibility of severe punitive sanctions should in theory deter violations, they can also, ironically, deter officials from disclosing pollution, as they fear personal liability [. . . F]earing such retribution, local officials in Jilin initially withheld information about the Songhua River toxic spill from

233. *See for example,* the legally multifaceted collaboration between Singapore and Indonesia to prevent transboundary "haze pollution:" Kexian Ng, *Transboundary Haze Pollution in Southeast Asia: The Effectiveness of Three Forms of International Legal Solutions*, 10 J. OF EAST ASIA & INT'L L. 221 (2017) ("Multi-bilateralism" stands for the pursuance and fulfilment of bilateral interests and commitments through multilateral settings (at times pretentiously, other times transparently), and this makes it a hybrid form of international cooperation, intermediate between bilateralism and multilateralism).

234. *See* Xuyu Hu, *The doctrine of liability fixation of state responsibility in the convention on transboundary pollution damage*, 20 INT'L ENVTL. AGREEMENTS 179, 182 (2020).

environmental agencies, government officials in the downriver province of Heilongjiang and Beijing, and the public.[235]

V. China, Domestically

> [I]n conceptualizing the law of property as it applies to environmental protection, we could learn a good deal from the Romans. We can conceive of seashores, for example, not as areas subject to unlimited private rights, but as places over which the [S]tate exercises a trust for the benefit of the public. That view is now reflected in some American cases.[236]

V.1 China and Western capitalism: from energy and the environment to the environment and culture

Energy and environmental policies are similarly bound to common fate,[237] through a link the EU struggles to match in its external action, owing to its responsibilities distribution across several Directorates-General and the overall "constitutional" configuration of the EU as a *sui iuris* organisation.[238] This is regrettable: "China is a huge global energy polluter due to the extensive use of coal, and making China share the EU views on the link between energy, energy security and climate change [would be] therefore of crucial importance."[239] *Similiter*, the argument goes for the interdependency between natural and cultural heritage.[240]

235. Allison Moore & Adria Warren, *Legal Advocacy in Environmental Public Participation in China: Raising the Stakes and Strengthening Stakeholders*, 8 CHINA ENV'T SERIES 3, 13 (2006).

236. James Russell Gordley, *The Enforcement of Foreign Law: Reclaiming One Nation's Cultural Heritage in Another Nation's Courts*, ENFORCING INTERNATIONAL CULTURAL HERITAGE LAW 110, 122 (James Russell Gordley & Francesco Francioni eds., 2013). For the concept of "public trusteeship" in the law of Ancient Rome, see Brian John Preston, *The Evolving Role of Environmental Rights in Climate Change Litigation*, 2 CHINESE J. OF ENVTL L. 131, 136 (2018).

237. *See*, *e.g.*, Maria Kenig-Witkowska, *The European Union Perspective on Cultural Heritage and Climate Change Issues*, 3 J. OF COMP. URB. L. & POL'Y 63, 73–4 (2019).

238. *See* Rafael Leal-Arcas & Antonio Morelli, *The Resilience of the Paris Agreement: Negotiating and Implementing the Climate Regime*, 31 GEO. ENVTL L. REV. 1, 34, 40 (2018).

239. Jakub M. Godzimirski and Nina Græger, *Conclusion: The EU, Energy, and Global Power Shifts*, EU LEADERSHIP IN ENERGY AND ENVIRONMENTAL GOVERNANCE: GLOBAL AND LOCAL CHALLENGES AND RESPONSES 203, 208 (Jakub M. Godzimirski ed., 2016).

240. Margherita Paola Poto, *Environmental Regulation in China through the lens of the European Model*, 18 ASIA PAC. J. OF ENVTL. L. 69, 84 (2016).

Although "China's Ecological Civilisation" [*Zhōngguó shēngtài wénmíng*, 中国 生态文明] is built on an autocratic, bombastic, top-down and hierarchical—but *politically* driven—version of the Western *academic* concept of the "Anthropocene,"[241] China's cultural heritage strategy for inclusive growth emphasises the economic impact of such heritage over its societal implications.[242] This cannot surprise all those who noticed that despite pretences of differentiation on moral grounds,[243] the Chinese model has not been able to express any serious alternative to the exploitative anthropocentric model invented by post-Medieval Europeans,[244] which captures the quintessence of humans as the exclusive uncontested masters of the Earth[245] (both natural and cultural forms of heritage included). In fact, the "idealisation of "communist" China as somehow an ecotopian prototype [. . .] seems very misplaced in the wake of post-Tiananmen Square capitalist China."[246] As mentioned in the previous paragraphs, Europe and other Western actors (e.g., Canada) are striving to remedy to their historical legacy by propelling a new model based on human-nature conceptual interdependence and operative integration, which has not yet appealed to China (perhaps out of fears of renewed separatism[247]). This is

241. Coraline Goron, *Ecological Civilisation and the Political Limits of a Chinese Concept of Sustainability*, 4 CHINA PERSPECTIVES 39, 43–5 (2018).

242. BRITISH COUNCIL 2018, CULTURAL HERITAGE FOR INCLUSIVE GROWTH, at 18. https://perma.cc/6J67-BSD3.

243. "For a fruitful intellectual dialogue on sustainability involving China to take place, it is essential to distinguish between those who try to develop an [Ecological Civilisation] theory based on political philosophy principles and a general interrogation of the means and ends of economic and political modernity based on the Chinese experience, from those who hold that [Ecological Civilisation] designates the model of environmental governance carried out by the Chinese government today. This cannot be achieved when theory and practice are confused and when the global rise of China is simplistically equated with the replacement of an 'ecocidal' Western hegemony by a presumably more 'ecologically civilised' Chinese hegemony" (and the reverse, obviously). Goron, *supra* note 241, at 49–50.

244. Franz M. Hartmann, *Towards a Social Ecological Politics of Sustainability*, POLITICAL ECOLOGY: GLOBAL AND LOCAL 329, 335–340 (Roger H. Keil et al. ed., 1998); Paul G. Harris, *Environmental values in a globalising world: The case of China*, ENVIRONMENTAL VALUES IN A GLOBALISING WORLD: NATURE, JUSTICE AND GOVERNANCE 123, 124–25 (Jouni Paavola & Ian Lowe eds., (2005). Confucianism is particularly prone to nature exploitation; *see* PETER HAY, MAIN CURRENTS IN WESTERN ENVIRONMENTAL THOUGHT 97 (2002).

245. WESTON & BOLLIER, *supra* note 178, at 49; *see also* UPAMANYU PABLO MUKHERJEE, POSTCOLONIAL ENVIRONMENTS: NATURE, CULTURE AND THE CONTEMPORARY INDIAN NOVEL IN ENGLISH 62 (2010); Thomas Sparks, *The Place of the Environment in State of Nature Discourses: Reassessing nature, property and sovereignty in the Anthropocene*, 10 MPIL RESEARCH PAPER SERIES 17 (2020).

246. DAVID E. PEPPER, MODERN ENVIRONMENTALISM: AN INTRODUCTION 96 (1996).

247. Joseph Kowalski, *Environmentalism Isn't New: Lessons from Indigenous Law*, 26 BUFFALO ENVTL. L.J. 15, 51 (2019).

perhaps because China has a few minorities but not diverse "indigenous populations" like e.g., Canada, Australia, or Indonesia do,[248] which is an additional reason why it has not (yet) "absorbed" indigenous claims and developed a public discourse to channel this sort of novel orientations.[249] Recognising the interfaces between natural and cultural heritage is easier for those who have built their survival upon a harmonious, non-exploitative relationship with their surroundings. "Indigenous environmentalism [. . .] has grounded itself in the idea that human use of the land is fundamental to the well-being of both people and nature. The natural community is incomplete without *active* human membership,"[250] fashioned participatorily at the street level.[251] It is no accident that the 1989 International Labour Organisation ("ILO") Convention No. 169 on Indigenous and Tribal Peoples asks governments to "ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, *cultural and environmental* impact

248. CLAUDIA SOBREVILA, THE ROLE OF INDIGENOUS PEOPLES IN BIODIVERSITY CONSERVATION: THE NATURAL BUT OFTEN FORGOTTEN PARTNERS 3 (The World Bank 2008) ("[I]n Mexico and China the total population of Indigenous Peoples is large [. . .], while the diversity of ethnic groups is relatively low [. . .]. In contrast, Brazil, Indonesia, and the United States have a low number of indigenous inhabitants […] while their diversity is relatively high [. . .]. Where the population of Indigenous Peoples is low, they tend to face greater threats because they represent true minority groups"); *see also id.* at 20.

249. "At the normative level, an attitude of legal pluralism also creates space for a much larger variety of norms that may be employed to devise cooperative solutions to the global climate and biodiversity crises. For example, [. . .] the "slow activism" inherent in indigenous [. . .] narratives can be employed to deconstruct and reshape definitions of the Anthropocene associated with mono-cultural representations. In some Pacific Island nations, local systems of customary resource use are increasingly recognised as valuable normative approaches to environmental management as communities are seeking to cope with the adverse effects of climate change [. . .]. These local systems are often undervalued or ignored in international environmental law, in part because they tend to be located in oral histories and other forms of intangible cultural heritage differing starkly from formal legal sources." Justin Rose et al., *Primal Scene to Anthropocene: Narrative and Myth in International Environmental Law*, 66 NETH. INT'L L. REV. 441, 468 (2019); *see also* Environmental Rule of Law – First Global Report, at 164, UNEP 2019; International Law Commission, Sixty-eighth Session, Third report on the protection of the environment in relation to armed conflicts (submitted by the Special Rapporteur, H.E. Marie G. Jacobsson), ¶ 57, U.N. Doc. A/CN.4/700 (2016).

250. LANCE NEWMAN, THE LITERARY HERITAGE OF THE ENVIRONMENTAL JUSTICE MOVEMENT: LANDSCAPES OF REVOLUTION IN TRANSATLANTIC ROMANTICISM 95 (2019) (emphasis added).

251. *See generally* Stephen Stec, *Developing Standards for Procedural Environmental Rights through Practice: The Changing Character of Rio Principle 10*, PROCEDURAL ENVIRONMENTAL RIGHTS: PRINCIPLE X IN THEORY AND PRACTICE 3, 18 (Jerzy Jendrośka & Magdalena Bar eds., 2018).

on them of planned development activities."[252] Accordingly, what the "lawyers of the Anthropocene" advocate is not a complete and utopian human withdrawal from nature, but rather a balanced, respectful, and harmonious coexistence between humans and natural landscapes (not natural *resources*) that stands in line with the unifying theory of natural and cultural heritage in their inextricable essentiality for "their" local communities. Said lawyers of the Anthropocene interpret liability schemes as transformative agents from commutative to restorative to distributional justice—that is, a generative, autopoietic justice rather than an extractive one. As one scholar recently put it, "our laws about nature should be consistent with the laws of nature."[253] Considering that China suffers from the absence of an indigenous population that can keep lawmakers on-guard about the sophistication and ineluctability of human-nature linkages, it would be *a fortiori* desirable that such linkages were enforced upon China via international liability arrangements featuring nature-heritage interactions and emphasising the "hidden," profound meanings thereof.

Confirming the general considerations in the previous paragraphs, the 1992 China's Maritime Code provides that "without prejudice to the right of claims for loss of life or personal injury, claims with respect to damage to harbor works, basins and waterways, and aids to navigation have priority over other property claims"[254] (arguably including culturally-significant ones). Keeping the form and rejecting the substance, however, one may take inspiration from this provision, insofar as one way of protecting cultural heritage *of universal value* via complying with the World Heritage Convention would be that of granting damages to such a heritage a similarly phrased priority.

In sum, China has made unhoped-for progress as far as environmental awareness is concerned[255]—involving both home companies and the supply

252. ILO Convention, No. 169 on Indigenous and Tribal Peoples, at 8 (1989) (art. 7(3) (emphasis added); *see also* Jeremy Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT'L L. REV. 219, 238–39 (2005); Klemetti Näkkäläjärvi & Pekka Kauppala, *Sacred Sites of the Sámi – Linking Past, Present and Future*, EXPERIENCING AND PROTECTING SACRED NATURAL SITES OF SÁMI AND OTHER INDIGENOUS PEOPLES: THE SACRED ARCTIC (Leena Heinämäki & Thora Martina Herrmann eds., 2017).

253. Jan G. Laitos, *How Science Has Influenced, But Should Now Determine, Environmental Policy*, 43 WM. & MARY ENVTL. L. & POL'Y REV. 759, 761 (2019) (emphasis omitted).

254. Bingying Dong, &, Ling Zhu, *Civil Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances: Chinese Perspective*, 50 OCEAN DEV. & INT'L L. 209, 219 (2019).

255. *See* Xiaoyi Jiang & Jianwei Zhang, *China's Legislative Practices on Climate Change after the Paris Agreement*, 10 J. OF EAST ASIA AND INT'L L. 259 (2017) (brief overview of China's central and regional legislation on environmental pollution in the aftermath of the Paris Agreement); *see also* Zhilin Mu et al., *Environmental Legislation in China: Achievements, Challenges and Trends*, 6 SUSTAINABILITY, 8967 (t.1) (2014).

chain of multinational corporations[256]—but it has still a long way to go before satisfactorily translating this awareness into effectively enforceable mandates on liability.

V.2 Civil liability for environmental damages

Differently from virtually all civil-law jurisdictions, China had had no comprehensive civil code until very recently: it is only in January 2021 that the Chinese civil law, previously spread across sector-specific pieces of legislation subordinated to the General Principles of the Civil Law of China, will find updated systematisation in an enforceable PRC Civil Code. To be sure, in the area of liability the Civil Code confines itself to the reception of what the General Principles and dedicated laws had already contemplated, with minor additions. The only difference—a rather theoretical one—is that with the Civil Code, liability provisions are uplifted to the status of "basic law" within the Chinese Constitution's definition.[257] The General Principles provided that "[c]ivil liability shall still be borne even in the absence of fault, *if the law [so] stipulates*,"[258] and that "[a]ny person who pollutes the environment and causes damage to others *in violation of state provisions for environmental protection and the prevention of pollution* shall bear civil liability *in accordance with the law*."[259] On the other hand, "[i]f any person causes damage to other people by engaging in operations that are greatly hazardous to the surroundings [. . .], he shall bear civil liability [. . .]."[260] In sum, only those who engage in *ultrahazardous* operations impacting *other humans* bear liability *no matter what*, whilst others' liability is conditional upon further qualifications related to other sector-specific laws. Said sector-specific legislation may well be, in this case, China's Tort Liability Law ("TLL") promulgated on 26th December 2009, in force from 1st July 2010;[261] it provides that "[i]n the event of any dispute arising from environmental pollution, the polluter shall bear the burden of proof with regard to the legal basis for bearing no liability or mitigation of its liability and the nonexistence of causation between its act and the harmful consequences."[262] The TLL further prescribes that "[w]here any harm is caused by environmental pollution for

256. SAM YOONSUK LEE ET AL., GREEN LEADERSHIP IN CHINA: MANAGEMENT STRATEGIES FROM CHINA'S MOST RESPONSIBLE COMPANIES 63–64 (2014).

257. *See* ZHU WANG, ON THE CONSTITUTIONALITY OF COMPILING A CIVIL CODE OF CHINA: A PROCESS MAP FOR LEGISLATION BORN OUT OF PRAGMATISM 77–81 (2020).

258. Civil Code art. 106 (China) (emphasis added).

259. *Id.* at art. 124 (emphasis added).

260. *Id.* at art. 123.

261. *Id*. (An unofficial yet authoritative English translation is available at https://perma.cc/3ESC-LV9G.)

262. *Id*. at art. 66.

the fault of a third party, the injured party may require compensation from either the polluter or the third party."[263] This latter provision is deemed to confirm the Chinese fault-independent approach to liability in civil litigation in environmental matters (as well as generally).[264] As environmental cases always turn to complex (and costly)[265] evidentiary appraisals and this burden-of-proof shift onto defenders is extremely, indeed, burdensome for the latter, Chinese courts "often split the blame for losses, a legal concept known as shared liability. In a 2004 case in Shāndōng, for example, two fish farmers only received 51 per cent of their requested compensation on the grounds that they should have sought government help mitigating the effects of an oil spill."[266] The new Civil Code maintains the scheme reported above, whilst extending the scope of the damages (not only "environmental," but also "ecological") and introducing punitive damages in the case of wilful harm,[267] together with a right to public-interest litigation which is not fully clarified.[268] China's faultless-liability approach to environmental pollution was also confirmed by the Supreme People's Court ("SPC") Judicial Interpretation[269] on the

263. SAM YOONSUK LEE ET AL., *supra* note 233, at art. 68.

264. Adam J. Moser & Tseming Yang, *Environmental Tort Litigation in China*, 41 ENVTL. L. REP. 10895, 10897 (2011).

265. *See* Christine J. Lee, *"Pollute First, Control Later" No More: Combating Environmental Degradation in China Through an Approach Based in Public Interest Litigation and Public Participation*, PAC. RIM L. & POL'Y J. 795, 812–813 (2008).

266. Rachel E. Stern, *From Dispute to Decision: Suing Polluters in China*, 206 THE CHINA QUARTERLY 294, 302 (2011) ("Shared liability" may correspond to *joint liability*, *several liability*, or *joint and several liability* in Western common law, depending on the case in point; yet, it does not perfectly overlap with any of them, which is one of the many issues to be aware of when it comes to international negotiations on these technical "legalise" details.).

267. *See* Jason E. Kelley, *Seeking Justice for Pollution Victims in China: Why China Should Amend the Tort Liability Law to Allow Punitive Damages in Environmental Tort Cases*, 35 SEATTLE U. L. REV. 572, 572-57 (2012) (punitive damages had been already suggested in legal scholarship); Vincent R. Johnson, *Punitive Damages, Chinese Tort Law, and the American Experience*, 9 FRONTIERS OF L. IN CHINA 321, 326 (2014).

268. *See* Tiantian Zhai & Yen-Chiang Chang, *The Contribution of China's Civil Law to Sustainable development: Progress and Prospects*, 11 SUSTAINABILITY 294, 304 (2019) (comparison between the *ante* and *post* Code environmental liability regime).

269. PRC law endows the SPC with the license to interpret very specific questions regarding the application of laws, regulations, and decrees at all levels of Chinese judicial proceedings; such interpretations are doctrinally deemed *de facto* binding. *Zhōnghuá rénmín gònghéguó fǎyuàn zǔzhī fǎ* (中华人民共和国人民法院组织法) [The Law of the People's Republic of China on the Organization of the People's Courts] (promulgated by Standing Comm. Nat'l People's Cong., Oct. 31, 2006, effective Jan. 1, 2007) (China) art. 33. For an overview of the legal instruments employed by the SPC to quasi-legislate within the PRC's civil-law system, see Susan Finder, *The "Soft Law" of the Supreme People's Court*, SUPREME PEOPLE'S COURT MONITOR, https://perma.cc/VG34-W2ZQ.

Application of Law in the Trial of Disputes over Liability for Environmental Torts,[270] which further specified that

> the tort claimant should establish the "relatedness" (关联性) rather than the "causality" between the emissions and the pollution impact in issue, which clearly dilutes the burden of proof for environmental tort claimants. [. . .] If the claimant succeeds, the defendant, in turn, must provide evidence to prove that there is no causal relationship between the polluting behaviour and the damage.[271]

Interestingly, liability in the absence of fault was also part of China's trade strategy till recently:

> previously there had been a legislative trend to focus environmental responsibility for polluting factories onto "finished goods producers". These finished goods producers c[ould] be final assembling factories *or* distributors along the supply chain. This approach contrasted with that of the [EU], which puts responsibility directly onto "producers" to identify all environment-related data *along* the supply chain. Under the [Energy-using Product Directive] of the EU, companies have to report total energy used during a product's lifecycle, including the energy used during manufacturing and transportation. China has moved in this direction with the [2002 Clean Production Promotion Law]. This law has introduced the concept of producer responsibility and life-cycle approach for both resource use and waste management.[272]

The fact that differently from virtually all tort laws, the Chinese one provides for liability of parties *not* at fault in several circumstances, owes to the peculiar socio-political configuration of the country. "Chinese academia often views tort law as a private law, which supposedly recognizes the individual autonomy of the parties more than any other areas of law. In fact, however, the TLL is deeply characterized by socialism and is used as a tool to maintain social stability, which is the overwhelming goal

270. 最高人民法院关于审理环境侵权责任纠纷案件适用法律若干问题的解释, adopted at the 1,644th Session of the Judicial Committee of the Supreme People's Court on February 9, 2015, effective on June 3, 2015, art. 1.

271. Yue Zhao et al., *Prospects for Climate Change Litigation in China*, 8(2) TRANSNAT'L ENVTL. L. 349, 371 (2019).

272. Feng Lin et al., *The political economy of China's environmental law reforms*, LAW AND POLICY FOR CHINA'S MARKET SOCIALISM (John Garrick ed., 2012).

of the [S]tate."[273] The same control that, at the international level, China wants to feel released from.

One decade ago, Chinese law provided for three collective liability schemes, yet rarely enforced (or even enforceable) in practice: the Mechanism for Socializing Environmental Risks ("MSER"), the Environmental Liability Insurance System ("ELIS"), and the Environmental Damage Compensation System ("EDCS").[274] Ten years later, too little has changed, despite the fact that courts have specified what costs those liable might incur into. For example, the 2017 SPC's Judicial Interpretation on Compensation for Marine Environmental Damage establishes a compensation regime encompassing "(a) the cost of preventive measures; (b) the cost of reasonable measures of reinstatement; (c) the loss during the period of reinstatement; and (d) the cost of investigation and assessment."[275] The only proper advancement comes from China's Environmental Protection Law, which did not mention liabilities in 1979 yet includes liability and compensation in its 2014 revision,[276] while keeping with China's long history of allowing for multi-plaintiff lawsuits seeking compensation.[277] Notable, too, is that in December 2007 the then-State Environmental Protection Agency (subsequently "PRC Ministry of Environmental Protection," now "PRC Ministry of Ecology and Environment"), jointly with China's Insurance Regulatory Commission, issued the Guidelines on the Development of Pollution Liability Insurance, which have been be promoted in pilot cities and provinces including Hunan, Hubei and Jiangsu, Ningbo, Shenyang, Shanghai, Chongqing, Shenzhen, and Kunming.[278]

273. Liu Chenglin, *Socialized Liability in Chinese Tort Law*, 59 HARV. INT'L L.J. 16, 17 (2018); s*ee also* Wei Zhang, *Understanding the Law of Torts in China: A Political Economy Perspective*, 11 U. PA. ASIAN L. REV. 171 (2016) (reiterating these observations but through a more economic prism).

274. *See* Canfa Wang et al., *Pondering over the incident of Songhua River pollution from the perspective of environmental law*, CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 294–96 (Michael G. Faure and Song Ying eds., 2008).

275. Dong, *supra* note 254, at 214.

276. Zhōnghuá Rénmín Gònghéguó Huánjìng Bǎohùfǎ (中华人民共和国环境保护法（主席令第九号）) [Environmental Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 24, 2014, effective Jan. 1, 2015), art 5, 6, 52, ch. VI (China).

277. Tyler Liu, *China's Revision to the Environmental Protection Law: Challenges to Public Interest Litigation and Solutions for Increasing Public Participation and Transparency*, 6 J. ENERGY & ENVTL. L. 60, 65 (2015).

278. Lin, *supra* note 272, at 109.

V.3 The paradoxical Chinese attitudes in the "private" sector

Framed against stakeholder theory and legitimacy theory respectively, business and sociological analyses have concluded that the *non-binding* expectations of the Chinese government are forcing environmentally-unfriendly state-owned companies out of the market.[279] Indeed, Chinese large firms are increasingly engaged in *voluntary* corporate environmental reporting due to paradoxically

> *coercive* [institutional] isomorphism, whereby the Chinese government links incentives such as grants and contracts and access to resources to explicit [corporate social responsibility]. Although the [corporate environmental reporting] policies from the Chinese government do not take the form of traditional coercive [mandates] based on hard law, regulations, or taxes [. . .], the authoritarian capitalist institutional structures and environment mean that the incentives [. . .] that the [S]tate introduces [are] perceived by Chinese firms to be mandatory in nature [in the market's level playing field].[280]

279. *See* Hui Situ and Carol Ann Tilt, *Chinese government as a determinant of corporate environmental reporting: A study of large Chinese listed companies*, 18 J. ASIA-PAC. CENT. FOR ENVTL. ACCOUNTABILITY 251 (2012); *see also* Hui Situ and Carol Ann Tilt, *Mandatory? Voluntary? A Discussion of Corporate Environmental Disclosure Requirements in China*, 38 SOC. & ENVTL. ACCOUNTABILITY J. 131 (2018). Interestingly, this dynamic is not at play in the neighbouring India when it comes to e.g., liability for nuclear damage. Pursuant to the 2010 Civil Liability for Nuclear Damage Act, the Government takes over the compensation quota applicable to liable state-owned companies whenever said compensation exceeds the statutory amount specified in the Act. *See* M.P. Ram Mohan, *Indian Civil Nuclear Liability Law (CNLD Act): An Adventurism or Exceptionalism in International Legal Discourse*, LOCATING INDIA IN THE CONTEMPORARY INTERNATIONAL LEGAL ORDER (Srinivas Burra and R. Rajesh Babu eds., 2018). To better contextualise the Act, see *also* Ayushi Sutaria, *Placing the Indian civil nuclear liability regime in context: The extent of supplier's liability*, 17 J. RISK RES., 97 (2014).

280. Hui Situ et al., *The Influence of the Government on Corporate Environmental Reporting in China: An Authoritarian Capitalism Perspective*, 56 BUS. & SOC'Y 1, 31 (2018).

In a country where the silencing (often turning to self-censorship) of NGOs, specialised press, and civil activism still represents the norm,[281] where governmental policies about the environment can be only barely challenged by the ordinary citizens,[282] and where "the Government [. . .] remains concerned that environmental activism could lead to a broader push for political reform,"[283] this *de facto* coercion blending normative flexibility and market competition, which economists define as "induced innovation," appears to be the only leverage for the Party to build responsible economic communities and gain their trust.[284] This is supported by an upholding of the piercing-the-corporate-veil doctrine, explicitly codified in the 2005 PRC's Company Law,[285] as much as by foreign competition.[286] However, most emitters in China are state-owned either formally or practically, and public or public-equivalent companies notoriously (although somewhat counterintuitively) respond less flexibly to the solicitations of legal and financial incentives introduced by

281. Yet, the strategies implemented by those same actors to resurface and bring their claims and views forward should not be downplayed; to the contrary, some of those strategies are becoming increasingly effective, forcing authorities into openness, fairness, and transparency, though within the context of an authoritarian State overall. For an illustration of this tension that demonstrates how mentioned "green emancipation" is at least a two-decade-long tale, see Peter Ho, *Greening without conflict? Environmentalism, NGOs and Civil Society in China*, 32 DEV. & CHANGE 893 (2002); *see also* Jude Howell et al., *Accountability and legitimacy of NGOs under authoritarianism: The case of China*, 41 THIRD WORLD Q. 113 (2020).

282. ELIZABETH C. ECONOMY, THE THIRD REVOLUTION: XI JINPING AND THE NEW CHINESE STATE 184 (Oxford University Press, 2018); Genia Kostka and Chunman Zhang, *Tightening the grip: Environmental governance under Xi Jinping*, 27 ENVTL POLITICS 769, 772 (2018); *contra* Johann L. Thibaut, *An Environmental Civil Society in China? Bridging Theoretical Gaps through a Case Study of Environmental Protest*, 42 INTERNATIONALES ASIENFORUM 135 (2011).

`283.Yixian Sun, *The Changing Role of China in Global Environmental Governance*, 1 RISING POWERS Q. 43, 48 (2016).

284. One of the issues for the Party at the central level is that China's Environmental Protection Bureaus which are supposed to monitor environmental compliance on the ground at the local level are administered by officials who are appointed and funded by the provincial delegates of the Party itself, so that mutual protectionism to "look clean" before the higher ranks is still widespread, despite attempts at reforming this system and breaking this vicious circle by emphasising efficiency instead. Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes*, 6 MICH. J. OF ENVTL. & ADMIN. L. 203, 226 (2016); *see also* Benjamin van Rooij et al., *The Authoritarian Logic of Regulatory Pluralism: Understanding China's New Environmental Actors*, 10 REG. & GOVERNANCE 3 (2014).

285. *See* Hui Huang, *Piercing the Corporate Veil in China: Where Is It Now and Where Is It Heading?*, 60 AM. J. COMP. L. 743 (2012).

286. *See, e.g.*, Daniel Esty, *Red Lights to Green Lights: From 20th Century Environmental Regulation to 21st Century Sustainability*, 47 ENVTL. L. 1, 55 (2017).

governmental apparatuses.[287] "The growing dominance of [s]tate ownership (especially in China, India, Iran, Mexico, Russia, and Saudi Arabia) reduces the mitigation potential of investor-led disclosure,"[288] thus jeopardising liability. As Chinese scholars (affiliated to the leading Peking University in Beijing) themselves strongly word,[289] key state-owned enterprises are still *de facto* unaccountable in China, regardless of any state law, provincial regulation, or declaration to the opposite sense at any level of the Executive or the courts. State ownership of companies is further problematic at the international level, where such enterprises "might challenge the exercise of jurisdiction on the basis of the *act of [S]tate* doctrine, or comity of nations,"[290] also before arbitration tribunals;[291] in this sense, China might have more to lose compared to Western market-driven, private-competition-based economies if an international legal lifting of such defences were to be agreed upon globally.

Around the world, beyond criminal charges[292] and administrative penalties, civil-liability regimes may provide for numerous financial and non-financial tools, stemming from the assessment of, among others: specific damages; replacement costs; punitive damages; legally defined damages; legal costs; interests' adjustments; and non-monetary restitution.[293] Nonetheless, China implements a voluntary-first approach to

287. *See, e.g.,* HENRICK BERGSAGER & ANNA KORPPOO, CHINA'S STATE-OWNED ENTERPRISES AS CLIMATE POLICY ACTORS: THE POWER AND STEEL SECTORS 59 (NORDIC COUNCIL OF MINISTERS 2013), https://perma.cc/B8UJ-HW6A.

288. Maria L. Banda, *The bottom-up alternative: The mitigation potential of private climate governance after the Paris Agreement*, 42 HARV. ENVTL. L. REV. 325, 361 (2018).

289. *See, e.g.*, Jin Wang et al., *Reflections from the transboundary pollution of Songhua River*, CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 273, 289 (Michael G. Faure & Song Ying eds., 2008).

290. Meinhard Doelle & Sara Seck, *Loss & Damage from Climate Change: From Concept to Remedy?*, 20 CLIMATE POL'Y 669, 675 (2020) (emphasis added).

291. Refer to all pertinent examples reported in Michael Feit, *Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity*, 28 BERKELEY J. INT'L L. 142, 157 (2010).

292. For a pertinent summary about China's environmental criminal legislation, see Thomas Richter, *Transboundary Environmental Crimes: An Analysis of Chinese and European Law*, CHINA AND INTERNATIONAL ENVIRONMENTAL LIABILITY: LEGAL REMEDIES FOR TRANSBOUNDARY POLLUTION 253, 263–65 (Michael G. Faure & Song Ying eds., 2008); s*ee also* He & Cliquet, *supra* note 205, at 160; Alexander Nikolaevich Shytov, *Environmental Crime and Communication to the Public in China*, 22 J. CHINESE POL. SCI. 57, 57–75 (2017).

293. ANDREW FARMER, HANDBOOK OF ENVIRONMENTAL PROTECTION AND ENFORCEMENT: PRINCIPLES AND PRACTICE 137–38 (2007).

non-compliance,[294] whereby not to lose their "face,"[295] top managers disclose sensitive business information to the enforcement authorities and gradually progress towards compliance rather than being sanctioned openly and straightaway.[296] Although transposing domestic arrangements onto the international level is always argumentatively risky, this closely resembles the patterns which have increasingly crystallised in multilateral environmental instruments, where *hard responsibility* (standard in international law generally) is replaced by *soft responsibility* in terms of expectations to compliance, enforced through *soft mechanisms* and (at times) supported by private liability schemes.[297] This is apparently a contradiction as, theoretically, China would be supposed to endorse a traditional sense of state-centred and sovereignty-rooted responsibility with little purchase into "the contemporary international law of co-ordination that follows the private law paradigm[, thus] not only based on sovereign equality but also on democracy[, solicitations from the private sector,] and human rights."[298]

VI. China, internationally

VI.1 China and the ongoing talks on international liability

Intervening at the debates being hosted by the United Nations ("UN"), Mr Jia Guide—current Director-General of the Department of Treaty and Law of the PRC's Ministry of Foreign Affairs, and representative of China at the 19th Meeting of the 6th Committee during the UNGA's 58th Session on 30 October 2003,[299] believed

> conditions were in place for the International Law Commission to pursue an in-depth study on international liability. The Commission should carry out more studies on domestic and international practices on the topic, to find common denominators that would solidly lay the groundwork for a uniform regime. The

294. But only in this field: in several others, e.g., cybersecurity, companies are compelled to disclose incompliance *also publicly* on penalty of huge fines.

295. On the concept of "face" in Chinese sociology and management, see *e.g.*, Peter C. King & Wei Zhang, *The Role of Face in a Chinese Context of Trust and Trust Building*, 18 INT'L J. CROSS CULTURAL MGMT. 149, 149–73 (2018); Qi Xiaoying, *Reconstructing the Concept of Face in Cultural Sociology: In Goffman's Footsteps, Following the Chinese Case*, 4 J. CHINESE SOC. 1, 1–17 (2017).

296. FARMER, *supra* note 293, at 146, 155.

297. Maljean-Dubois, *supra* note 108, at 39–41.

298. Armin von Bogdandy et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115, 119 (2017).

299. U.N. GAOR, 58th Sess., 19th mtg., U.N. Doc. A/C.6/58/SR.19 (Oct. 31, 2003).

> proposed allocation-of-loss regime should *combine principles with flexibility*. China endorsed, in principle, the various proposals of the special rapporteur on the scope of the topic and compensation for damage to the environment, among others. He said the proposals should be fleshed out and *adjusted on the basis of further survey of State practice*.[300]

The problem with this statement is that the only way to collect state practice emanating from new doctrine or phenomena is by waiting a significant amount of time, which may vary depending on the field. In opposition to Italy, The Netherlands, and other countries, China had previously—and successfully—argued for limiting ILC drafts to transboundary harm on other sovereign territories only, rather than on the commons as well.[301] In IEL, this helps indeed distinguishing between the transboundary-harm regime and the climate-change one, although this is *not* the same as to say that these two issues *should* in fact be kept separate (especially for the purpose of safeguarding cultural heritage).

VI.2 A "developing" China vis-à-vis climate change regimes

Extra-responsibility liability is an essential aspect to scrutinise because it addresses a wider spectrum of state actions compared to complementary (i.e. responsibility-dependent) liability, but also because individual responsibilities of States are, in this field, factually non-actionable.

> [T]here is the idea to attribute climate change-related damage to a State based on its historical emissions or to the degree in which it fulfils its reduction targets contained in the Kyoto-Protocol. [. . .] However, [if] the attribution of responsibility for damages is linked to the reduction targets that States willingly consent to, then there is considerably less incentive to commit to such obligations[,][302]

300. Press Release, 6th Comm. Gen. Assem., Harmful Effects of Transboundary Pollution Cited as Key to Proposed Law to Govern International Liability, U.N. Press Release GA/L/3241 (Oct. 30, 2003), https://perma.cc/S6ML-ADFU (emphasis added).

301. *See* Official Records of the UN General Assembly, Fifty-third Session, Sixth Committee, 14th meeting (A/C.6/53/SR.14), p. 6, ¶ 40.

302. Franziska Knur, *The United Nations Human Rights-Based Approach to Climate Change – Introducing a Human Dimension to International Climate Law*, CLIMATE CHANGE AS A THREAT TO PEACE: IMPACTS ON CULTURAL HERITAGE AND CULTURAL DIVERSITY 37, 48 (Sabine von Schorlemer & Sylvia Maus eds., 2014).

and this adds to the already reluctant approach shown by most major emitters; to start with, this would surely turn off China's most recent enthusiasm for the codification of emission control regimes. The rationalist cost-benefit calculation goes that "[t]he greater the benefits a [S]tate can gain from defection, the greater the necessity for deterrence in the form of a threat of punishment. This means the more that [S]tates are required to change their behaviour and the greater the incentive to free ride, the greater the need for enforcement, incentives and disincentives as counterbalances."[303] The question remains however to what extent, to punish a country's firm, that country should be punished for not preventing or regulating enough its company's pollution; indeed, punishing a country equates to shifting the burden to its citizens, most of whom might have nothing to do with said company's operations, nor market.

Before Russia was expelled from the G8, the latter frequently met in its 8+5 configuration including not only the eight world-top industrialised countries, but also the Group of Five (Brazil, China, India, *Mexico*, and South Africa – not to be confused with the BRICS), and in this wider configuration it tried to impact climate change policies at the global level.[304] Contrariwise,

> the G20 combines—as institutional equals in a single forum—the world's two leading climate polluters, China and the United States, and the world's major powers and polluters that cause and can thus control climate change. The first eight G20 summits from 2008 to 2013 dealt increasingly with climate change and started to shift the leadership of the world's evolving climate change control regime from the prevailing UN-led, divided, development-first one to a new, inclusive, equal, environment-first one. But as its ninth summit in 2014 dramatically revealed, the G20 faced severe internal divisions and remained unable to meet the challenge by creating a full control regime that worked, either outside or inside the UN.[305]

The G7 Summits held in Paris and Houston in 1989 and 1990 respectively addressed environmental concerns extensively, but China—invited to participate—could not exercise notable influence on the discussion as the diplomatic circles were shocked at the Tiananmen

303. JÜRGEN FRIEDRICH, INTERNATIONAL ENVIRONMENTAL "SOFT LAW": THE FUNCTIONS AND LIMITS OF NONBINDING INSTRUMENTS IN INTERNATIONAL ENVIRONMENTAL GOVERNANCE AND LAW 328 (2013).

304. JOHN JAMES KIRTON & ELLA KOKOTSIS, THE GLOBAL GOVERNANCE OF CLIMATE CHANGE: G7, G20, AND UN LEADERSHIP 182–84 (2015).

305. KIRTON & KOKOTSIS, *supra* note 304, at 9–10.

Square's massacre of unarmed student protesters.[306] However, the international community could not afford to leave China behind, as in 2005 it "surpassed the U.S. as the leading emitter of greenhouse gas in the world . . . Brazil had surpassed Russia the year before. India had surpassed Japan in 1995. It was clear that climate change could not be controlled unless the Rio-Kyoto regime was replaced with one where all major carbon polluters were obliged to control their carbon."[307] The 2007 G7 Summit organised in Heiligendamm pledged to institutionalise mentioned 8+5 configuration with regards to the climate change dossier, and partly succeeded in overcoming the dichotomy between Global North and Global South, by convincing China and India[308] to join the industrialised world's efforts as major emitters. "Now all countries, including "major emitters," would act together, with the North going furthest and fastest and still transferring resources to the South, and the South constraining its carbon as its responsibility and capacity allowed."[309] At the 2009 Pittsburgh Summit, China vetoed a funding scheme for climate change initiatives, although an agreement was reached about withdrawing fossil-fuel subsidies: "the G20 successfully reached out to put a[n] inclusive, expanded, innovative regime in place. But it did not revive the failing old UN regime at its next COP, taking place in Copenhagen [ten] weeks later,"[310] where China vetoed third-party verification on the actual implementation status of any binding commitment.

This whole digression on the G7/G8/G20 was instrumental for illustrating the following paradox: China was "doing more domestically than [it was] prepared to agree to internationally;"[311] it vetoed both the funding scheme and the verification mechanism. Back then, the popular President Obama was attracting praise worldwide, therefore China could only emerge meaningfully by opposition;[312] conversely, the Trump era has been characterised by massive U.S. retreat from leadership in

306. KIRTON & KOKOTSIS, *supra* note 304, at 81–93.

307. *Id*. at 189.

308. Yet, the United Nations University warns that "[e]ven in the event that a few countries like China and India are able to make the leap forward as *fast-developing countries*, the rest of the developing countries will still continue to face serious challenges in the international negotiating arena" – Joyeeta Gupta, *Increasing Disenfranchisement of Developing Country Negotiators in a Multi-Speed World*, THE POLITICS OF PARTICIPATION IN SUSTAINABLE DEVELOPMENT GOVERNANCE 21, 35 (Jessica F. Green & W. Bradnee Chambers eds., 2006) (emphasis added).

309. KIRTON & KOKOTSIS, *supra* note 304, at 202.

310. *Id.* at 230.

311. *Id*. at 250.

312. Indeed, during the Paris Agreement negotiations under Obama's second presidential term, China appeared "largely unwilling to take a leadership role before the US." Luke Kemp, *US-proofing the Paris Climate Agreement*, 17(1) CLIMATE POL'Y 86, 97 (2017).

multilateralism,[313] which made it easier for Beijing to "fill the void" and gain prominence by proposing itself as a constructive and world-order-supporting forthcoming superpower.[314] The authenticity and genuineness of Chinese commitments can be questioned on the ground that they depend on Washington's foreign policy more than on policy stances they consistently attempt to uphold before multilateral fora: whenever politically convenient, the "propaganda-shaped" national interests of distinguishing themselves from the current superpower trump the substantive ones inherent in global environmental discourses. Nonetheless, it is fair to note that China's "environmentalist turn" was inaugurated and gradually yet systematically pursued by President Xi during the last two years of Obama's second presidential term, which helped converging American and Chinese stances in Paris after the diplomatic blow in Copenhagen. At any rate, by signing the 2014 China-Korea and China-Switzerland Free Trade Agreements, China committed to high levels of environmental protection and not to curb the existing national environmental legislation. This exemplifies what has been termed as the "support network" shaping *binary* negotiations.[315] The Chinese turn from Copenhagen to Paris was commended internationally[316] and functioned well as an identity reinforcer for the Party, too, both domestically in terms of symbolic legitimacy credited to the pursuance of a state-planned green economy,[317] and externally, where China was eventually "hailed . . . as a global leader on climate change."[318] However, it shall be emphasised that the Paris Agreement does not provide for any enforceable liability regime, neither as a corollary of state responsibility for a breach of said stipulation,

313. Yet, this is a long-standing issue in US foreign policy, especially vis-à-vis public international law; for an introductive explanation of the American international legal isolationism, see, *e.g.*, David D. Caron, *Between Empire and Community – The United States and Multilateralism 2001-2003: A Mid-Term Assessment*, 21 BERKELEY J. INT'L L. 395 (2003).

314. *See* Harold Hongju Koh, *The Trump Administration and International Law*, 56 WASHBURN L. J. 413, 437 (2017). *See also* Adam J. Tooze, *Did Xi Just Save the World?*, FOREIGN POLICY (Sept. 25, 2020), https://perma.cc/77GL-V3RF (trying to make sense of China's pledge at the UN to be carbon-free by 2060). Furthermore, "the fact that environmental stewardship is not a liberal norm, but one arising from shared fates, offers [China] the opportunity to offset some of the damage to its image done by its rejection of democracy and liberal human rights." Robert Falkner & Barry Gordon Buzan, The Emergence of Environmental Stewardship as a Primary Institution of Global International Society, 25(1) EUR. J. INT'L REL. 131, 146 (2019).

315. DEBBIE DE GIROLAMO, THE FUGITIVE IDENTITY OF MEDIATION: NEGOTIATIONS, SHIFT CHANGES AND ALLUSIONARY ACTION 13 (2013).

316. Anthony H. F. Li, *Hopes of Limiting Global Warming? China and the Paris Agreement on Climate Change*, 1 CHINA PERSPECTIVES 49, 50 (2016).

317. Alex L. Wang, *Symbolic Legitimacy and Chinese Environmental Reform*, 48 ENVTL. L. 699, 757–58 (2018).

318. *Id*. at 755.

nor as a responsibility-independent compensatory scheme for climate change-related damages which do not represent a violation of this "framework agreement" under public international law.[319]

In addition, differential treatments remain dangerous stipulations beneficiary States try to take advantage of.[320] For instance, exemptions based on developmental status might impair the negotiating machine up to rendering a global environmental regime ineffective, as occurred in the case of the Kyoto Protocol when the US Senate unanimously rejected its ratification on the basis that countries like China and India were "unfairly" not demanded to comply with the same rules.[321] On their part, the Indo-Chinese alliance rebutted that its contemporary polluting flow matters relatively little compared to the polluting stock cumulated by industrial power over the last three centuries.[322] One possible solution was to provide "compensation to developing countries for the costs that would promote using the most efficient energy technologies. Another suggestion [wa]s for advanced countries to acquire emission rights issued by developing countries. A third proposal [was to implement] a common tax framework with cross-border transfers."[323] Accounting for the fact that long-standing polluters like the US or the UK could not foresee the environmental effects of their industrial development till relatively recently, someone suggested the application of a sort of "faultless liability" scheme according to which such countries would not be held declaratively responsible for said pollution, while still being liable to compensate (at least in the form of higher standards to be upheld in present times) for the damage caused to the planet over the last three centuries.[324] Other scholars rebutted that there is no reason to make those countries pay if they are not considered responsible, as the two things shall come together;[325] this notwithstanding, mentioned rebutting scholars fail to appreciate two elements: that liability

319. Maryam al-Dabbagh, *Towards a Middle Path: Loss & Damage in the 2015 Paris Agreement*, N.Y.U. ENVTL. L.J. (2016), https://perma.cc/DN5Y-QCGD; *see also* Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT'L AFF. 1107, 1117 (2016).

320. ELLI LOUKA, INTERNATIONAL ENVIRONMENTAL LAW: FAIRNESS, EFFECTIVENESS, AND WORLD ORDER 110–11 (2006).

321. LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 12 (2012). President Bush himself played a resolutive role towards this rejection. *See generally* Greg Kahn, *The Fate of the Kyoto Protocol Under the Bush Administration*, 21 BERKELEY J. INT'L L. 548 (2003).

322. CARLOS M. PELÁEZ & CARLOS A. PELÁEZ, GLOBALIZATION AND THE STATE: TRADE AGREEMENTS, INEQUALITY, THE ENVIRONMENT, FINANCIAL GLOBALIZATION, INTERNATIONAL LAW AND VULNERABILITIES VOLUME II 62 (2008).

323. *Id.* at 63.

324. *See, e.g.*, Henry Shue, *Global Environment and International Inequality*, 75 INT'L AFF. 531, 535–36 (1999).

325. *See, e.g.*, Simon Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 L.J.I.L. 747, 762 (2005).

without responsibility is a useful legal device to address a factual situation without losing oneself in endless doctrinal debates on whose fault it is from an abstractly doctrinal standpoint; and that the *bona fide* ignorance of such countries is highly debatable, given the obviousness of those effects on the ecosystem even before non-expert eyes. Beyond this specific dispute, no doubt exists that legal devices like liability need a rethinking as to converge towards the needs of the Anthropocene, "likely to force a re-evaluation of the legal irrelevance of small scale individual actions" that, through big numbers, escalate their effects rapidly and call for an equally ready legal response before things precipitate irreversibly.[326]

The interesting fact is that China would face today several criticism when relying on its supposedly "developing" status, which has already been questioned by several industrialised States[327] as well as by the World Bank and the WTO among other bodies.[328] When negotiating the global climate change regime, developed countries decided to disapply the concept of "common heritage of mankind"[329] with reference to the atmosphere, as "to steer away from policies that might encourage distributional and *collectivistic approaches* to global resource management;"[330] those same collectivistic approaches do, in theory, subsume the ideological foundations of the Chinese state, population, and ruling class ("socialism with Chinese characteristics;" "socialist market economy"). Consequently, one would expect China to uphold such vision of the world society in all circumstances, including its potential "upgrading" to developed-country status and possible overtaking of the US as the only superpower. The Director of Leiden University's Grotius Centre for International Legal Studies speaks about the commons as being treated like "common sink" by world's great powers,[331] and despite the brutal expression, he might not stand too far from the truth; a few hopes do still hold, however, with regards

326. Eric Biber, *Law in the Anthropocene Epoch*, 106 GEO. L.J. 1, 42–45 (2017).

327. Clara Weinhardt & Tobias T. Brink, *Varieties of Contestation: China's Rise and the Liberal Trade Order*, 27 REV. INT'L POL. ECON. 258, 268 (2020).

328. On the untenability of this dichotomy, see Rostam Josef Neuwirth, *A Constitutional Tribute to Global Governance: Overcoming the Chimera of the Developing-Developed Country Dichotomy*, 2010/20 EUROPEAN UNIVERSITY INSTITUTE [EUI] WORKING PAPERS (2010) (It.); *see also* Rostam Josef Neuwirth, *Global Law and Sustainable Development*: *Change and the "Developing-Developed Country" Terminology*, 29 EUR. J. DEV. RES. 911 (2017); Rostam Josef Neuwirth, *"BRICS Law": An Oxymoron, or from Cooperation, via Consolidation, to Codification*, 6 BRICS L.J. 6, 14 n. 49 (2019).

329. First introduced in the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

330. OKEREKE, CHUKWUMERIJE GLOBAL JUSTICE AND NEOLIBERAL ENVIRONMENTAL GOVERNANCE: ETHICS, SUSTAINABLE DEVELOPMENT AND INTERNATIONAL CO-OPERATION 137 (2008) (emphasis added).

331. Nicolaas Schrijver, *Managing the Global Commons: Common Good or Common Sink?*, 37(7), THIRD WORLD Q. 1252–1267 (2016).

to a different approach to "global superpowering" by countries like China, at least from an environmental perspective. Whilst China has already challenged the *lex lata* by acting or at least arguing *de lege ferenda* as a norm entrepreneur *but in an exploitative fashion* in other fields broadly considered as "commons"—such as outer space security and maritime delimitations, especially with regards to its Exclusive Economic Zone (EEZ)[332]—Beijing seems placed more promisingly with regards to the atmosphere and Earth's environmental resources. One last element to be mentioned here concerns China's participation in multilateral efforts to deploy space satellite technology as to measure the concentration of toxic emissions and make States answerable under IEL;[333] whether this would prove auxiliary to cultural-heritage preservation, too, remains to be seen, not only in terms of identifying polluting activities insisting on heritage locations, but more specifically as far as international legal mechanisms are concerned, that is, in retailoring liability schemes.

VI.3 China's sovereignty and transboundary environmental damage

Upholding the generally recognised principle that international duties of non-intervention prevent any sort of interference with the political, socioeconomic *and cultural* life of other States,[334] the damage to cultural heritage through transboundary pollution might be reinterpreted as undue interference in the sovereignty of third countries. The same interference is produced when global phenomena are at play.

In keeping with its orthodox international affairs' rhetoric, China qualifies its subscription to—or endorsement of—international environmental instruments by stressing the term *sovereignty*;[335] as the latter can be argued from any side, this is a double-edged game to play.[336] For example, a stress on "sovereignty" in climate change law may equally underpin polluting countries (whose *sovereignty* should not be infringed upon with restraints, limitations, blames, sanctions, investigations, and so

332. Carla Park Freeman, *An Uncommon Approach to the Global Commons: Interpreting China's Divergent Positions on Maritime and Outer Space Governance*, 241 CHINA Q., 1, 15–16 (2020), https://perma.cc/Y4R3-ZMJG.

333. *See* Timiebi Aganaba-Jeanty & Anna Huggins, *Satellite Measurement of GHG Emissions: Prospects for Enhancing Transparency and Answerability under International Law*, 8(2) TRANSNAT'L ENVTL. L. 303, 314 (2019).

334. BRADLY J. CONDON, ENVIRONMENTAL SOVEREIGNTY AND THE WTO: TRADE SANCTIONS AND INTERNATIONAL LAW 250–51 (2006).

335. *See, e.g., Wang Yi Attends Global Pact for the Environment Summit* MINISTRY OF FOREIGN AFF. OF CHINA (Sept. 20, 2017), https://perma.cc/492C-VZNL; Xiao Hong, *China Lauds UN Environment Pact,* CHINA DAILY, https://perma.cc/AW99-GAL4 (last updated Sept. 20, 2017).

336. LINDA HAJJAR LEIB, HUMAN RIGHTS AND THE ENVIRONMENT: PHILOSOPHICAL, THEORETICAL AND LEGAL PERSPECTIVES 127 (2011).

forth) and polluted ones (whose *sovereignty* is violated any time they have to bear the consequences of pollution produced elsewhere). Over time, both meanings may turn out useful for a country to rely upon in different sets of circumstances. Building on this observation, how may China better project the environmentalist image of its contribution to climate governance, whilst at the same time protecting its sovereignty-centred narratives? The risk-allocation discourse provides an insightful model, whereby China cannot admit fault for transnational pollution cases, nor can it accept its own territory being polluted by third States, and the solution lies in fault-free regimes where States do not officially accept liability yet they allocate resources to common funds to be "automatically" employed in the event of an environmental accident. Quite remarkably, the Chinese delegation did not oppose the Global Pact for the Environment whose Enabling Resolution was introduced by France at the UNGA in 2018; whilst distancing itself from other countries' claims that the Pact would have constituted an unprecedented encroachment upon States' sovereignty, Beijing explicitly endorsed the French concerns and even "pardoned" the inadequate consultation of the Group of 77+China's chairperson.[337] In other words, China does not see any paradox in supporting international liability schemes versus domestic ones, insofar as the former "combine a duty of operators to provide financial security and guarantees for potential compensation claims with subsidiary industry- and/or State-sponsored funds;"[338] these are the classical private international law *modi operandi*,[339] as such what is missing or uncertain is the public dimension of the same mechanisms (liability of States themselves, as well as individual *non-criminal* liability directly under international law, which would be quite revolutionary a legal solution).

VII. Tentative conclusions

This article endeavoured to be one of the first-ever attempts to unpack the way in which responsibility-independent[340] IEL liability schemes might be transposed into the protection of cultural heritage worldwide—yet operating the necessary distinctions between the non-overlapping rationales underpinning these two protecting regimes—and what benefits

337. Aguila, *supra* note 144, at 20–22.

338. Alexander Proelss, *Polluter-Pays*, A GLOBAL PACT FOR THE ENVIRONMENT: LEGAL FOUNDATIONS 85, 92 (Yann Aguila & Jorge E. Viñuales eds., 2019)

339. *See generally* Guillaume Laganière, *Liability for transboundary pollution in private international law: A duty to ensure prompt and adequate compensation*, Ph.D. thesis 22, 89, 119 (McGill University, 2020), https://perma.cc/TBT7-GAT6.

340. "Faultless," "fault-free," or "no-fault" in domestic-law jargon. *See, e.g.,* JULIO BARBOZA, THE ENVIRONMENT, RISK AND LIABILITY IN INTERNATIONAL LAW 103 n. 97 (2011).

and hurdles that transposition would encode. Further study is needed to determine how said transposition may find applicability in factual scenarios; research building on this first theoretical attempt will need to explore who is liable (and not necessarily *responsible*) for cultural heritage damages *under environmental law* (or partly under such regime) when the latter are caused by third state and non-state actors, at times jointly with state and non-state actors of the primary State. Perhaps some model applications of the Coase theorem to scenarios where environmental liability schemes might serve to protect cultural heritage may help, too, as other scholars have tried to accomplish in different fields of environmental regulation.[341] Three core issues are: what compensation is due; how the quantum is determined; and what differences arise between "the commons" and "ordinary" heritage. Nonetheless, all the preliminary considerations above allow us to essay a couple of provisional conclusions. Our hope is that they will serve as a springboard for new scholarship, less stuck in old-fashioned responsibility problems but rather projected towards concrete resolutory alternatives.

Internationally, the current cultural heritage law regime appears unequipped to face the contemporary challenges; an analysis of UNESCO conventions and other relevant documents has shown that such regime is unbalanced in favour of wartime damages to tangible heritage, thus failing to thoroughly address peacetime damages, destruction of intangible legacies, and attacks against sites where nature and heritage conflate unmissably. IEL is not fully equipped either, and yet, despite most liability schemes resolving in political decisions, if one of the two regimes is to be updated, the environmental one is perhaps more advisable an option in terms of doctrines, legal tools, and trends.[342] On top of that, a fund-based, compensation-without-fault approach is well received also by those who maintain a property-centred approach to heritage and the environment; in fact, "[w]hile continuing to oppose global regulatory schemes, which may pose their own threats to property rights and individual liberty, [Free Market Environmentalism] adherents should consider the viability of various international compensation or indemnification mechanisms."[343]

As for China, it generally champions the concept of faultless liability, that is, a type of liability which does not depend on the defendant being subjectively responsible for the act under scrutiny. The relevant assessment is not "whether the damage that occurred represented the materialisation of

341. *See, e.g.*, Tamar Meshel & Moin A. Yahya, *International Water Law and Fresh Water Dispute Resolution: A Coasean Perspective*, 92(2) UNIV. OF COLO. L. REV. (2021).

342. E.g., by integrating specific cultural-heritage clauses within the liability section of environmental agreements.

343. Jonathan H. Adler, *Taking Property Rights Seriously: The Case of Climate Change*, 26(2) SOC. PHIL. & POL'Y, 296, 316 (2009).

one of the risks that made the defendant's conduct negligent,"[344] but merely whether causation exists between the damage and the defendant's (in)actions. When it comes to transboundary damage, China sympathises with the introduction of hybrid multilateral *public-private* liability schemes (provided they do not result in naming-and-shaming attitudes against the PRC) whilst retracting from establishing its own domestically (grounded in extraterritoriality), which also precludes bilateral recognition.[345] To the contrary, as far as climate change is concerned, Beijing privileges domestic targets[346] but remains wary of—or at least, lukewarm about—*binding* liability solutions internationally (unless they come in the model of the Multilateral Fund attached to the Montreal Protocol, examined *supra*).

This bifurcation proves highly problematic for the sake of our discussion, as protecting heritage through IEL means relying on state liability schemes addressing *both* issues, whose effects are often integrated and escalate each other. After all, why should a "developing" country like China contribute to multilateral funds, beyond reputational gains? For example, accepting the need for such contribution is easier when considering heritage of universal value through the prism of the commons, in such a way that wherever they are located, and the loftier the ambitions of China as a potential superpower, the more such outstandingly valuable heritage is somehow "Chinese" as well (although, as we have already discussed, sorting "universal" heritage from "ordinary" one is controversial an exercise). Also, those funds could be designed differently from others where all participants or potential beneficiaries are required to regularly (preventively) contribute regardless of contingent necessity: a need-based

344. Donal Nolan, *Deconstructing the Duty of Care*, 129 L. Q. REV. 559, 575 (2013).

345. "With the exception of the treaties the countries participate in for civil liability, China, Korea and Japan have largely remained outside of the transnationalization of environmental law, specifically, and even civil law, generally. Overall, there is lower "interoperability" of national court systems in Northeast Asia [compared to North America]. Even in commercial disputes, Asian plaintiffs generally do not participate in the grand American tradition of forum shopping. Strict reciprocity is still required for the recognition of foreign judgments in the three countries, discouraging foreign plaintiffs' recourse to justice in the region. [. . .] In Northeast Asia, [. . . s]tate practice has consistently emphasized diplomatic channels to address transnational concerns, particularly in the field of transboundary pollution." Laura S. Henry et al., *From Smelter Fumes to Silk Road Winds: Exploring Legal Responses to Transboundary Air Pollution over South Korea,* 11(3) WASH. U. GLOBAL STUD. L. REV., 565, 607 (2012).

346. *See also* Deng Haifeng [邓海峰], *China*, CLIMATE CHANGE LIABILITY: TRANSNATIONAL LAW AND PRACTICE 112, 125–135 (Richard Lord et al. eds., 2012). It shall be emphasised that these are indeed *targets*: "there is still relatively little political appetite in China to pass a climate change law, and [. . .] any climate litigation that emerges is likely to take a more peripheral route, for example, by focusing on issues of air pollution," which are a purely domestic matter displaying a *domestic* plaintiff versus a *domestic* defendant arguing *domestic* incidents. *See* Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113(4) AM. J. INT'L L. 679, 693 (2019).

arrangement might be thought of instead, where money and other forms of assistance are provided on occasion by selected participants, according to quotas previously negotiated – this solution, however, would be slightly more time-consuming in the event of an actual disaster, as the money could not be dispensed automatically.

Needless to say, the present analysis has focused on fairly numerous *but still selected* segments of China's posture in international law and international relations, whilst many more elements warrant to be dissected and analysed.[347] For this reason, we call for further research on this topic, aimed at validating or disproving the aforementioned claims by means of alternative doctrinal standpoints, possibly with the auxilium of empirical datasets, and in light of the never-obvious trajectory of the PRC in its endeavour to appoint itself as a (responsible?) shaper of the global legal order. It might catch us all by surprise!

347. For example, the liability of China for environmental degradation resulting from Belt and Road Initiative ("BRI") infrastructure projects impacting cultural heritage would be worth exploring: some UNESCO-listed sites (like "Silk Roads: the Routes Network of Chang'an-Tianshan Corridor") belong indeed to the same BRI concept. *See*, Jingkui Jiang, *Silk Road Cultures and the Silk Road Economic Belt,* CHINA'S GLOBAL REBALANCING AND THE NEW SILK ROAD 15 (B. R. Deepak [狄伯杰] ed., 2018); *see also* Tang Xiaoyang, *Co-evolutionary Pragmatism: Re-examine "China Model" and Its Impact on Developing Countries*, 29(126) J. OF CONTEMP. CHINA 853, 867–868 (2020); Marina Lostal &, Guilherme Vasconcelos Vilaça, *The Bamiyazation of Cultural Heritage and the Silk Road Economic Belt: Challenges and Opportunities for China*, 3(2) CHINESE J. OF COMP. L. 329 (2015). Interestingly, "Beijing has in the past made promises to 'green' the One Belt One Road. But in his historic address to the U.N. General Assembly, Xi made no mention of China's foreign projects. [. . .] A green One Belt One Road would be an even more dramatic proposition that the original coal-based version." Adam J. Tooze, *Welcome to the Final Battle for the Climate*, FOREIGN POL'Y (Oct. 17, 2020), https://perma.cc/2MF3-ZFCH.

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